UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPEAL NO. 17-16920

CHRISTERPHOR ZIGLAR, LEAH CANDELARIA, and MAURICE MEINTZER, individually and on behalf of all others similarly situated,

Plaintiff-Appellees

v.

EXPRESS MESSENGER SYSTEMS, INC.

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA (PHOENIX DIVISION)

Case No. 2:16-cv-02726-SRB
The Honorable Susan R. Bolton, United States District Judge

MOTION OF PLAINTIFF-APPELLEES IN SUPPORT OF REQUEST FOR SUMMARY DISPOSITION

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INTRODUCTION

For the second time in this case OnTrac[1] attempts to appeal the District Court's denial of its motion to compel arbitration. However, in light of the Supreme Court's recent decision in New Prime,[2] OnTrac's appeal is now essentially frivolous and should be subject to summary disposition.

This Court heard oral argument in this case in August 2018 and promptly remanded the District Court's ruling finding that the arbitration agreements between Plaintiffs and SCI, a third-party payroll company, are unconscionable, in light of the Supreme Court's intervening decision in Epic Systems.[3] The District Court then affirmed its finding of unconscionability. In the meantime, the Supreme Court issued its long-awaited decision in New Prime, finding that delivery drivers like Plaintiffs are transportation workers exempt from the reach of the FAA regardless of whether they are characterized as independent contractors or employees. This intervening decision has rendered the District Court's decision essentially unnecessary because the clause is now simply unenforceable under the FAA. It therefore renders OnTrac's appeal futile. Because New Prime eliminates OnTrac's attempt to enforce the arbitration agreement, it would serve no purpose

[1] "OnTrac" refers to Defendant-Appellant Express Messenger Systems, Inc.

[2] New Prime Inc. v. Oliveira, 139 S. Ct. 532 (2019).

[3] Epic Systems Corp. v. Lewis, 138 S.Ct. 1612 (2018).

other than further delay, to allow this appeal of the District Court's ruling denying its motion to compel. Thus the appeal should be subject to summary disposition.

ARGUMENT

I. Standard of Review

This Court may grant summary disposition or summary affirmance "[a]t any time prior to the completion of briefing in a civil appeal if the Court determines … that it is manifest that the questions on which the decision in the appeal depends are so insubstantial as not to justify further proceedings …." Ninth Circuit Rule 3-6.[4] The Ninth Circuit clarified the standard for filing and granting motions for summary disposition under Rule 3-6 in United States v. Hooton, 693 F.2d 857 (9th Cir. 1982). In Hooton, the Court stated that "[i]n a nonemergency situation … a motion to affirm a final judgment may be granted only where 'it is manifest that

[4] In full, Rule 3-6 provides: "At any time prior to the completion of briefing in a civil appeal if the Court determines:

(a) that clear error or an intervening court decision or recent legislation requires reversal or vacation of the judgment or order appealed from or a remand for additional proceedings; or

(b) that it is manifest that the questions on which the decision in the appeal depends are so insubstantial as not to justify further proceedings the Court may, after affording the parties an opportunity to show cause, issue an appropriate dispositive order.

At any time prior to the disposition of a civil appeal if the Court determines that the appeal is not within its jurisdiction, the Court may issue an order dismissing the appeal without notice or further proceedings."

the questions on which the decision of the case depends are so unsubstantial as not to need further argument." 693 F.2d at 858. Such situations include "appeals obviously controlled by precedent and cases in which the insubstantiality is manifest from the face of appellant's brief." Id. "Where the outcome of a case is beyond dispute, a motion for summary disposition is of obvious benefit to all concerned." Id.

Subsequently, the Ninth Circuit has referenced the Hooton decision in in fashioning a standard for determining when the Court can preclude an appellant from proceeding with a petition or appeal. In re Thomas, 508 F.3d 1225 (9th Cir. 2007). In Thomas, the Court explained that it may preclude an appeal from proceeding "when it is clear from the face of appellant's pleadings that (i) the appeal is patently insubstantial or clearly controlled by well settled precedent; or (ii) the facts presented are fanciful or in conflict with facts of which the court may take judicial notice." Id. at 1227. The standard set out in Hooton and In re Thomas is met in this case.

As relevant here, an intervening decision can have a dispositive effect on an appeal: "where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and

should reject the prior circuit opinion as having been effectively overruled." Miller v. Gammie, 335 F.3d 889, 893 (9th Cir. 2003). The first Ninth Circuit opinion in this case issued prior to the Supreme Court's ruling in New Prime. Thus, the Ninth Circuit's first ruling, which instructs the District Court to re-examine its denial of OnTrac's Motion to Compel in light of Epic Systems, and indeed the District Court's affirmance that the clause was unconscionable, are simply moot in light of the New Prime ruling. Indeed, if anything, the proper course of action today would be for this Court to remand the case to the District Court to evaluate this case in light of New Prime.

II. The Instant Appeal is Clearly Controlled by Precedent

As explained above, this Court can grant summary disposition where the issues raised on appeal are controlled by well-settled precedent. See, e.g., Raul Molina Deocampo v. William P. Barr, 2019 WL 1505297, at *1 (9th Cir., Apr. 5, 2019) (granting respondent's motion for summary disposition "because Petitioner's argument is foreclosed by Ninth Circuit authority" where petitioner's claim was already rejected in Karthingithi v. Whitaker, 913 F.3d 1158 (9th Cir. 2019)); U.S. v. Vanegas-Ortiz, 489 Fed.Appx. 173, 174 (9th Cir. 2012) (granting appellee's motion for summary affirmance of the district court's judgment where "the questions raised in [the] appeal are foreclosed by Ninth Circuit authority"); U.S. v. Bemis, 184 Fed.Appx. 627, 628 (9th Cir. 2006) ("This appeal is appropriate

for summary disposition under Ninth Circuit Rule 3-6 because appellant challenges his sentence based on United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d. 621 (2005), but Booker does not apply to cases on collateral review.") Here, it is clear that recent Supreme Court precedent is dispositive of OnTrac's appeal.

In New Prime, the Supreme Court examined the proper scope of the "transportation worker" exemption to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1.[5] The Supreme Court held that courts need not make a preliminary decision as to whether workers are employees or independent contractors in order to determine whether they fall under the transportation worker exemption of the FAA. See New Prime at 543-544. Instead, the Supreme Court held that the transportation worker exemption applies to all transportation workers, regardless of whether they are employees or independent contractors because "[w]hen Congress enacted the Arbitration Act in 1925, the term 'contracts of employment' referred to agreements to perform work" rather than contracts between an employer and an

[5] Plaintiffs have continuously raised the applicability of the transportation worker exemption to the instant case throughout the course of the briefing on the Motion to Compel Arbitration, starting with their opposition. See Ziglar v. Express Mess. Sys., Inc., No. 2:16-cv-02726-SRB, Dkt. 43, p. 2 (D. Ariz. Jan 27, 2017) (attached hereto as Exhibit A) ("plaintiffs, who deliver packages in interstate commerce, are exempt from arbitration pursuant to the transportation worker exemption to the Federal Arbitration Act, 9 U.S.C. § 1, and the employer-employee exemption to the Arizona Revised Uniform Arbitration Act, A.R.S. § 12-3003(B)(1).").

employee. Id. The Supreme Court also held that "a court should decide for itself whether §1's 'contracts of employment' exclusion applies before ordering arbitration," regardless of whether the parties' contract contains a delegation clause that purports to delegate such issues to the arbitrator. Id. at 537. The package delivery drivers in this case are unquestionably covered by the FAA exemption.

Applying the New Prime decision in a case involving OnTrac drivers in Colorado, a federal court recently held that these drivers were exempt from the Federal Arbitration Act under Section 1's transportation worker exemption. See Ward v. Express Messenger Sys. Inc. dba Ontrac, Civ. A. No. 1:17-cv-02005, Dkt. 118, p. 8. (D. Colo. Jan. 28, 2019) (attached hereto as Exhibit B). Interpreting New Prime, the Ward court noted that "the FAA's 'terms and sequencing' bestow[] courts with the authority to decide in the first instance whether § 1's exclusions applied" and that Section 1's exemption "encompasses 'not only agreements between employers and employees but also agreements that require independent contractors to perform work.'" See Ward, No. 1:17-cv-02005, Dkt. 118 at p. 7 (quoting New Prime, 2019 WL 189342 at *6).

The Ward court also made clear that the OnTrac delivery drivers were engaged in interstate commerce, explaining that "plaintiffs work in the transportation industry, are directly responsible for transporting goods and services in interstate commerce, handle goods that travel in interstate commerce, use

vehicles that are vital to the commercial purposes of Defendants" and "are employees that would disrupt the flow of interstate commerce if they went on strike[.]" Id. at p. 11. In reaching this conclusion, the Ward court relied on a line of cases that found work analogous to that performed by delivery drivers here to be workers engaged in interstate commerce. See Palcko v Airborne Express, 372 F.3d 588, 593–94 (3d Cir. 2004) ("if Congress intended the residual clause of the exemption to cover only those workers who physically transported goods across state lines, it would have phrased the FAA's language accordingly."); Christie v. Loomis Armored US, Inc., No. 10-cv-02011-WJM-KMT, 2011 WL 6152979, at *3 (D. Colo. Dec. 9, 2011) (finding that an armored vehicle driver whose job was "to transport currency, a good that is undisputedly in the stream of interstate commerce," was a member of "a class of workers engaged in interstate commerce and is therefore exempt from the FAA pursuant to Section 1," even though the plaintiff herself did not cross state lines to make the deliveries); Lenz v. Yellow Transp., Inc., 431 F.3d 348, 352 (8th Cir. 2005) (citing Harden v. Roadway Package Sys., Inc., 249 F.3d 1137 (9th Cir. 2001)) ("[i]ndisputably, if [the plaintiff] were a truck driver, he would be considered a transportation worked under §1 of the FAA.").

Other courts have recently followed suit. In Rittman v. Amazon, Inc., a district court denied defendant's motion to compel arbitration, finding that the

plaintiffs, who only drove in the state of Washington, fell within the ambit of the FAA's transportation worker exemption and explaining that "Plaintiffs deliver packaged goods that are shipped from around the country and delivered to the customer untransformed." No. 16-cv-01554, Dkt. 115, p. 4 (W.D. Wash. Apr. 23, 2019) (attached hereto as Exhibit C). Similarly, the California Court of Appeals in Nieto v. Fresno Beverage Company, Inc., held that a delivery driver who delivered beverage products in California was subject to the FAA Transportation worker exemption. Specifically, the Court explained that "a transportation worker does not need to cross state lines in order to engage in the movement of goods in interstate commerce." Nieto v. Fresno Beverage Company, Inc., No. F074704, 2019 WL 1076387, at *5 (Cal. Ct. App. Mar. 7, 2019). The Eleventh Circuit likewise recently found that ice cream delivery drivers who only drove within the state, nevertheless transported goods in interstate commerce (and were thus subject to the FLSA's motor carrier exemption). Ehrlich v. Rich Products Corp., 18-12195, 2019 WL 1502279, at *3 (11th Cir. Apr. 4, 2019) ("Although the RSRs transported the products only in Florida, their deliveries were a part of a continuous stream of interstate commerce because there was a practical continuity of movement between the RSRs' deliveries to the retail stores and the overall interstate flow.").

In this case, as in New Prime and in Ward, Amazon, Nieto, and Ehrlich, it is clear that Plaintiffs are transportation workers engaged in interstate commerce, and

are therefore exempt from the reach of the FAA under the transportation worker exemption.[6] The applicability of the transportation worker exemption in this case renders moot any arguments OnTrac may make regarding the District Court's finding of unconscionability. That is, Plaintiffs would be exempt from arbitration *regardless* of whether or not the contracts SCI are unconscionable. Thus, the Supreme Court's New Prime Decision and cases subsequently interpreting it clearly control the outcome of this Appeal.

As noted above, the New Prime decision, which came after the Ninth Circuit's ruling on OnTrac's first appeal, has rendered that ruling obsolete. The new criterion by which to measure whether the arbitration agreements at issue in this case are enforceable is New Prime, not Epic Systems. And indeed, courts interpreting the New Prime ruling have been in agreement that delivery drivers like Plaintiffs in this case are exempt from the reach of the FAA in light of New Prime.

[6] Plaintiffs would similarly be exempt from the reach of the Arizona Arbitration Act, which contains an exemption similar to that under the FAA. Specifically, the Arizona Arbitration Act contains an exemption for "any existing or subsequent controversy between an employer and employee or their respective representatives." Ariz. Rev. Stat. § 12-3003(B)(1). Because Plaintiffs have produced sufficient evidence to show they were OnTrac's employees, OnTrac could not move to compel arbitration under the AAA.

III. Questions raised in the Appeal are Insubstantial and do not Require Further Argument

The Ninth Circuit has also held that summary disposition is appropriate where the questions raised on appeal are insubstantial and do not require further argument. See In re Thomas, 508 F.3d at 1227 (precluding Thomas from proceeding with appeal in part because "the insubstantiality of the appeal is manifest from the face of [the] pleadings"); see also Gevorgyan v. Sessions, 713 Fed.Appx. 583 (9th Cir. 2018) (granting government's motion for summary disposition where questions raised by petition for review are so insubstantial as not to require further argument); Malnes v. United States Department of Education, 2018 WL 3374753 (9th Cir., May 22, 2018) (granting appellees' motion for summary disposition where "issues raised in [the] appeal do not warrant further argument"); Cupp v. Straley, 2016 WL 10592256 (9th Cir. Nov. 15, 2016) (same); Hendow v. University of Phoenix, 296 Fed.Appx. 587 (9th Cir. 2008) (same). OnTrac seeks to appeal, for the second time, the District Court's well-reasoned decision denying its motion to compel arbitration.

In its original, detailed decision denying OnTrac's Motion to Compel Arbitration, the District Court in this case held that the arbitration clause at issue to be "so permeated by unconscionability" that denial of the motion to compel arbitration was proper. See Ziglar v. Express Mess. Sys., Inc., No. 2:17-cv-02726-

SRB, Dkt. 64, p. 7(D. Ariz. Aug 31, 2017) (attached hereto as Exhibit D). The District Court declined to re-write the arbitration clause and enforce a contract filled with unconscionable provisions. Id. OnTrac then filed its first appeal of the Order denying its motion to compel arbitration, After a hearing, the Ninth Circuit vacated the Court's order and remanded the case to the District Court, with instructions to consider the impact of Epic Systems on its ruling denying the Motion to Compel arbitration. Ziglar v. Express Mess. Sys., Inc., No. 2:17-cv-02726-SRB, Dkt. 115.1 (D. Ariz Oct. 26, 2018) (attached hereto as Exhibit E).

Following remand, the District Court requested supplemental briefs from the Parties addressing the various arguments regarding enforceability of the arbitration agreement, and the impact of the Epic Systems decision. See Ziglar v. Express Mess. Sys., Inc., No. 2:17-cv-02726-SRB, Dkt. 116 (D. Ariz. Oct. 29, 2018) (attached hereto as Exhibit F). After considering the Parties' respective positions, the District Court once again held that the SCI arbitration agreement is unenforceable based on unconscionability, finding that Epic Systems did not impact its previous ruling. See Ziglar v. Express Mess. Sys., Inc., No. 2:17-cv-02726-SRB, Dkt. 123, p. 4 (D. Ariz. Mar. 4, 2019) (attached hereto as Exhibit G). Specifically, the Court explained that the decision "does not impact the Court's "prior conclusion, that "[t]he extent of unconscionability here would force the court to rewrite, rather than reinterpret, the Parties' arbitration provision." Id.

At this juncture, there has already been an appeal of the District Court's decision denying the Motion to Compel based on unconscionability, with the Parties submitting detailed briefs in support of their respective positions. There has also been extensive briefing at the District Court level, and the District Court has now issued *two* decisions denying the motion to compel based on unconscionability. And most recently, an appellate court considering the very same agreement has also reached the conclusion that it is permeated with unconscionable provisions, and that its offending portions cannot be severed. Subcontracting Concepts (CT), LLC v. DeMelo, A152205, 2019 WL 1552684 at *8 (Cal. App. 1st Dist. Apr. 10, 2019). A second appeal on the same issue simply would not raise any new and substantial issued for this Court's consideration.

CONCLUSION

Because OnTrac's appeal of the District Court's Motion to Compel Arbitration is foreclosed by the Supreme Court decision in New Prime, and because it presents no new substantial issues for this Court's consideration, summary disposition of the instant appeal is appropriate.

Respectfully submitted,

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By their attorneys,

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Dated: May 13, 2019

STATEMENT OF RELATED CASES

(Circuit Rule 28-2.6)

There are no related cases pending in this Court.

Dated: May 13, 2019

/s/ Harold L. Lichten
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EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

CHRISTERPHOR ZIGLAR, LEAH CANDELARIA, AND MAURICE MEINTZER, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

EXPRESS MESSENGER SYSTEMS, INC., A DELAWARE CORPORATION, d/b/a ONTRAC,

Defendant.

Case No.: 2:16-cv-02726-PHX-SRB

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR, ALTERNATIVELY, STAY PROCEEDINGS, AND COMPEL ARBITRATION

(Oral argument requested)

I. INTRODUCTION

Defendant Express Messenger Systems, Inc., d/b/a OnTrac ("Defendant" or "OnTrac"), has moved to compel Plaintiffs Christerphor Ziglar, Leah Candelaria, and Maurice Meintzer ("Plaintiffs"), current and former OnTrac delivery drivers, to individually arbitrate their minimum wage and overtime claims that are grounded in OnTrac's misclassification of Plaintiffs and all drivers as independent contractors. This Court should deny OnTrac's motion for five, independent reasons.

First, Plaintiffs, who deliver packages in interstate commerce, are exempt from arbitration pursuant to the transportation worker exemption to the Federal Arbitration Act, 9 U.S.C. § 1, and the employer-employee exemption to the Arizona Revised Uniform Arbitration Act, A.R.S. § 12-3003(B)(1).

Second, OnTrac has no right to enforce the arbitration provision at issue. The arbitration clause that OnTrac seeks to enforce appears in a contract between Plaintiffs and Subcontracting Concepts CT LLC ("SCI"), a third-party administrator that primarily processes payments from OnTrac to its delivery drivers. OnTrac is neither a signatory nor a third-party beneficiary to the arbitration provision in the SCI Agreement, and therefore cannot enforce it.

Third, this dispute does not fall within the limited scope of the arbitration provision, which applies only to disputes arising out of or relating to the SCI Agreement or to the service arrangement between Plaintiffs and "SCI's clients." Plaintiffs' statutory claims to minimum wage and overtime pay under federal and Arizona law do not rely, arise out of, or relate to the SCI Agreement. See Narayan v. EGL, Inc., 616 F.3d 895, 899 (9th Cir. 2010). Moreover, OnTrac is not, according to the terms of the SCI Agreement, "SCI's client[]," meaning Plaintiffs would have no way of knowing that they were agreeing to arbitrate any dispute with non-signatory OnTrac.

Fourth, the arbitration clause is substantively unconscionable and unenforceable under Arizona and federal law because it requires Plaintiffs to split the costs of arbitration (which they cannot afford to do), prohibits Plaintiffs from recovering statutory penalties,

and prohibits them from seeking to recover their attorney fees (all rights afforded to them under the Fair Labor Standards Act ("FLSA") and Arizona law), and would thereby effectively prevent them from vindicating their statutory rights.

Fifth, the class action waiver in the arbitration provision violates Plaintiffs' substantive statutory rights to engage in concerted activity under the National Labor Relations Act, 29 U.S.C. § 157 & 158 (as interpreted by the Ninth Circuit in Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016), cert. granted, 2017 WL 125665 (U.S. Jan. 13, 2017)), and to initiate and participate in a collective action under the FLSA, 29 U.S.C. § 216(b). As a result, the arbitration clause is unenforceable.

Accordingly, OnTrac's motion to compel arbitration must be denied.

II. FACTUAL BACKGROUND

OnTrac is a shipping and logistics company that specializes in package delivery services throughout the Western United States. Chase Decl., Dkt. 35-02, at ¶ 2. Plaintiff Meintzer has delivered packages for OnTrac full-time in the Phoenix, Arizona area since May 2014. Meintzer Decl. in Opp'n to Mot. to Compel Arbitration ("Meintzer Decl."), filed herewith, at ¶ 2. Similarly, Plaintiff Candelaria has delivered packages full-time for OnTrac in the Phoenix area since May 2014. Candelaria Decl. in Opp'n to Mot. to Compel Arbitration ("Candelaria Decl."), filed herewith, at ¶ 2. Plaintiff Ziglar delivered packages for OnTrac full-time in the Phoenix area from December 2015 to June 2016. Ziglar Decl. in Opp'n to Mot. to Compel Arbitration ("Ziglar Decl."), filed herewith, at ¶ 2.

All three Plaintiffs worked for OnTrac through one or more of OnTrac's Regional Service Providers ("RSPs"), which service various delivery routes for OnTrac. Meintzer Decl., at ¶¶ 3-9; Candelaria Decl., at ¶¶ 3-9; Ziglar Decl., at ¶¶ 3-6. Plaintiffs were hired to work for OnTrac by these RSPs, and were not recruited by, never worked for, and never spoke to, anyone related to SCI, a third party administrator/payroll service with whom Plaintiffs were required to sign contracts in order to begin doing their deliveries for OnTrac. Meintzer Decl., at ¶ 3; Candelaria Decl., at ¶ 3; Ziglar Decl., at ¶ 3. The contracts that Plaintiffs signed with SCI (the "SCI Agreement") do not mention or refer to OnTrac.

Simone Decl., Dkt. 35-1, Exs. A, C, E.[1] In practice during the time that Plaintiffs worked for OnTrac, essentially the only role that SCI played in the relationship between OnTrac and Plaintiffs was to process payments from OnTrac to Plaintiffs. Meintzer Decl., at ¶ 3; Candelaria Decl., at ¶ 3; Ziglar Decl., at ¶ 3.

The estimated overall cost for an individual arbitration of any of the Plaintiffs' misclassification and wage and hour claims would be approximately $56,000. See Schleier Decl. in Opp'n to Mot. to Compel Arbitration ("Schleier Decl."), filed herewith, at ¶¶ 5-13. The SCI Agreement signed by Plaintiffs require that the parties to any arbitration equally split the costs of arbitration. SCI Agreement, at ¶ 26 ("All parties shall bear their own costs for arbitration."). Accordingly, if the Plaintiffs are required to individually arbitrate their claims, pursuant to the arbitration provision in the SCI Agreement, they would be required to pay approximately $28,000 in arbitration costs. Schleier Decl. at ¶ 13. All three Plaintiffs have extremely limited financial means that would make paying such an amount to individually arbitrate their claims prohibitively expensive. Meintzer Decl., at ¶¶ 11-18; Candelaria Decl., at ¶¶ 11-18; Ziglar Decl., at ¶¶ 8-10.[2]

III. STANDARD OF REVIEW

"A motion to compel arbitration is decided according to the standard used by district courts in resolving summary judgment motions pursuant to Rule 56" of the Federal Rules of Civil Procedure. Coup v. Scottsdale Plaza Resort, LLC, 823 F. Supp. 2d 931, 939 (D. Ariz. 2011) (citations omitted). "The evidence of the non-movant is 'to be believed, and all justifiable inferences are to be drawn in his favor.'" Id. (citing Anderson v. Liberty Lobby,

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[1] The agreements with SCI signed by Plaintiffs are identical. Accordingly, for simplicity, Plaintiffs will simply refer to the SCI Agreement throughout this brief.

[2] Plaintiff Ziglar is currently unemployed, has no income or assets, and therefore certainly cannot afford to pay $28,000 to individually arbitrate his claims. Ziglar Decl., at ¶¶ 8-10. Plaintiffs Meintzer and Candelaria, who are partners, are still employed by OnTrac. However, their income, after work-related expenses, is insufficient for them to be able to afford their share of arbitration costs (which would be $56,000, since they both have claims against OnTrac). Meintzer Decl., at ¶¶ 11-18; Candelaria Decl., at ¶¶ 11-18.

Inc., 477 U.S. 242, 249-50 (1986)). "If there exists a genuine dispute of material fact", then the motion must be denied. Id.

IV. PLAINTIFFS ARE EXEMPT FROM ARBITRATION PURSUANT TO SECTION 1 OF THE FEDERAL ARBITRATION ACT

The Court need not reach any of Plaintiffs' contractual or statutory arguments regarding why OnTrac cannot enforce the arbitration provision in the SCI Agreement because Plaintiffs are exempt from arbitration under the FAA, which is the sole basis on which OnTrac seeks to compel arbitration. Section 1 of the FAA exempts from arbitration all "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. As interpreted by the United States Supreme Court, to qualify for the Section 1 exemption, an individual must (1) be a "transportation worker," (3) be "engaged in interstate commerce," and (3) work for a business pursuant to a "contract of employment." See Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1140 (9th Cir. 2001) (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 118 (2001)). District courts are required to determine whether an agreement for arbitration is exempt from arbitration under Section 1 of the FAA. In re Van Dusen, 654 F.3d 838, 843-45 (9th. Cir. 2011).

Plaintiffs plainly meet the first two criteria as they deliver packages that are in the flow of interstate commerce for a company whose sole purpose is to transport goods. See, e.g., Zamora v. Swift Transp. Corp., No. EP-07-CA-00400-KC, 2008 WL 2369769, at *6 (W.D. Tex. June 3, 2008) ("In order to be considered a transportation worker, an employee must actually be employed in the transportation industry, that is, an industry directly involved in the movement of goods."); Circuit City, 532 U.S. at 121 (noting that the phrase "engaged in interstate commerce" "means engaged in the flow of interstate commerce" and "denotes only persons or activities within the flow of interstate commerce") (quotation marks and citations omitted); Chase Decl., at ¶ 2 (OnTrac's Chief Administrative Officer declaring that "OnTrac is a shipping and logistics company that specializes in the arranging of regional shipping services in the Western United States.").

At this stage of the proceedings, at which the summary judgment standard applies, the Court must also hold that Plaintiffs work for OnTrac pursuant to "contracts of employment," and are therefore exempt from the FAA. In support of their motion for conditional certification, Plaintiffs have produced significant evidence to support their claim that they are OnTrac's employees. See Dkt. 29 (First Am. Compl.); Dkt. 33 (Mot. for Conditional Certification), at 3-5, 10-13; Dkt. 33-03 to 33-05 (supporting declarations) (all incorporated here by reference). This evidence is more than sufficient under the summary judgment standard to require denial of OnTrac's motion to compel arbitration. Omar v. Sea-Land Serv., Inc., 813 F.2d 986, 989 (9th Cir. 1987) ("Whether an 'employer-employee relationship' exists is also usually a question of fact that should go to the jury, 'if there is an evidentiary basis for its consideration.'").[3]

If, however, the Court believes that it must make a preliminary determination on this issue, the Court may permit the parties limited discovery and then conduct a hearing to determine whether Plaintiffs work for OnTrac pursuant to "contracts of employment." See, e.g., Doe v. Swift Transp. Co., 2:10-cv-00899 JWS, 2017 WL 67521, at *1 (D. Ariz. Jan. 6, 2017) (making preliminary finding, after discovery, that truck drivers worked for company pursuant to "contracts of employment"); Oliveira v. New Prime, Inc., 141 F. Supp. 3d 125, 135 (D. Mass. 2015) (holding that parties should conduct discovery "on the threshold question of the plaintiff's status as an employee or independent contractor"); Easterday v. US Pack Logistics, 15-7559 (RBK/AMD), Dkt. 42, at 22-23 (D.N.J. June 29, 2016) (Exhibit A) (same).

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[3] Courts routinely deny summary judgment motions brought by employers on the issue of whether couriers, like Plaintiffs, are employees, see, e.g., Solis v. Velocity Exp., Inc., No. CV 09-864-MO, 2010 WL 3259917, at *9 (D. Or. Aug. 12, 2010), and also routinely find that couriers are, in fact, employees, not independent contractors, see, e.g., Sakacsi v. Quicksilver Delivery Sys., Inc., No. 806CV1297T24MAP, 2007 WL 4218984, at *1 (M.D. Fla. Nov. 28, 2007); Ansoumana v. Gristede's Operating Corp., 255 F. Supp. 2d 197, 199 (S.D.N.Y. 2003); Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981 (9th Cir. 2014).

Alternatively, the Court could resolve the parties' dispute regarding the transportation worker exemption by holding, as Congress intended when it passed the FAA in 1925, that "contracts of employment" include all contracts to perform work, not only contracts between employers and employees. In 1925, independent contractors were consistently characterized as "employed." See, e.g., Jackman v. Rosenbaum Co., 260 U.S. 22, 30 (1922) ("[T]he party employed was an independent contractor."); Arthur v. Texas & P. Ry. Co., 204 U.S. 505, 516-17 (1907) (referring to "an independent contractor" as "employed … to do work upon the freight"). Those who hired independent contractors were described as "employers." See, e.g., John L. Roper Lumber Co. v. Hewitt, 287 F. 120, 121 (4th Cir. 1923) ("[W]hen a person contracts with another to do work … not subject to the employer's control or direction, except as to the results to be obtained, the employer is not answerable to a third person for injuries resulting from the negligence of the contractor."). Moreover, the work of an independent contractor was called "employment." See, e.g., Thomas M. Cooley, A Treatise on the Law of Torts 1098 (3rd.ed. 1906). In fact, many courts defined independent contractors as workers "exercising employment." See General Discussion of the Nature of the Relationship of Employer and Independent Contractor, 19 A.L.R. 226, 227-232, 243 (1922) (citing numerous cases). Additionally, numerous courts throughout the country specifically used the phrase "contract of employment" to refer to employers' contracts with independent contractors. See, e.g., Tankersley v. Webster, 116 Okla. 208 (1925) ("[T]he contract of employment . . . conclusively shows that Casey was an independent contractor."); Lindsay v. McCaslin, 123 Me. 197 (1923) ("When the contract of employment has been reduced to writing, the question whether the person employed was an independent contractor or merely a servant is determined by the court as a matter of law."); Waldron v. Garland Pocahontas Coal Co., 89 W. Va. 426 (1921) ("Whether a person performing work for another is an independent contractor depends upon a consideration of the contract of employment ….").

Moreover, as the Supreme Court explained in Circuit City, the Section 1 exemption emanated from Congress' concerns regarding "transportation workers and their necessary

role in the free flow of goods." 532 U.S. at 121. Given that purpose, Congress would have undermined the exemption by distinguishing between transportation workers who were independent contractors and employees. A truck driver, package deliverer, railroad conductor, or sailor is just as necessary to "the free flow of goods"—and just as able to interrupt that "free flow of goods" by engaging in a work stoppage and withholding his labor—if he is an independent contractor as he is if he meets a specialized definition of "employee" used for some other purpose.

In light of this background upon which the FAA was passed, this Court can avoid deciding, at this early stage, the ultimate issue in this case regarding whether Plaintiffs are OnTrac's employees. Instead, the Court can and should hold that "contracts of employment" includes all contracts to perform work and therefore, as a matter of law, encompasses Plaintiffs' agreements. See, e.g., Owner-Operator Indep. Couriers Ass'n v. C.R. England, Inc., 325 F. Supp. 2d 1252, 1258 (D. Utah 2004) (holding that transportation worker exemption applies to any agreement to "perform personally or through other drivers … to transport freight on the company's behalf").

Plaintiffs anticipate that OnTrac may argue that whether Plaintiffs qualify for the transportation worker exemption is irrelevant because, even if they are exempt, OnTrac can compel arbitration under the Arizona Revised Uniform Arbitration Act ("RUAA"). State law, however, provides no lifeline for OnTrac. First, OnTrac, in its Motion, moved to compel arbitration solely under the FAA, thereby waiving the right to rely on state law. Moreover, the arbitration agreement itself only provides for "arbitration in accordance with the Federal Arbitration Act." SCI Agreement, at ¶ 26. Thus, even assuming OnTrac is a third-party beneficiary to the arbitration provision (which it is not), see Section V, infra, the agreement is unambiguous on its face that any right to compel arbitration, to the extent it exists at all, is only permitted pursuant to the FAA. Most importantly, however, is the fact that the RUAA specifically exempts from its ambit "any existing or subsequent controversy between an employer and employee or their respective representatives." A.R.S. § 12-3003(B)(1); see also N. Valley Emergency Specialists, L.L.C. v. Santana, 208 Ariz. 301,

302 (2004) (holding, that predecessor Arizona Uniform Arbitration Act "exempt[ed] … all arbitration agreements between employers and employees"). Since Plaintiffs have produced evidence sufficient for the Court to find that Plaintiffs are OnTrac's employees, the Court cannot, at this stage of the proceedings, order Plaintiffs to arbitrate pursuant to the RUAA.

V. ONTRAC IS NOT A THIRD-PARTY BENEFICIARY TO THE ARBITRATION AGREEMENT SIGNED BY SCI AND PLAINTIFFS, AND THEREFORE CANNOT COMPEL PLAINTIFFS TO ARBITRATE

The plain language of the arbitration provision in the agreements between SCI and Plaintiffs—agreements to which OnTrac is not a signatory—makes clear that OnTrac, despite its claim, has no contractual right to compel Plaintiffs to arbitration, and is not a third-party beneficiary under Arizona law.

In this state, an entity is a third-party beneficiary to and may therefore enforce a contractual provision only if "1) the contract … indicate[s] an intention to benefit the third-party beneficiary, 2) the contemplated benefit …[is] both intentional and direct, and 3) it … [is] clear that the parties intended to recognize the third party as the primary party in interest." In re Jake's Granite Supplies, L.L.C., 442 B.R. 703, 710 (D. Ariz. 2010) (citing Valles v. Pima County, 642 F. Supp. 2d 936, 956 (D. Ariz. 2009) (citing Norton v. First Fed. Sav., 128 Ariz. 176, 178 (1981))). Third-party beneficiary status is not, however, an all-or-nothing proposition; "the parties [to a contract] can obviously intend for a third party to benefit from certain promises in a contract and not others." Republic of Iraq v. ABB AG, 769 F. Supp. 2d 605, 612 (S.D.N.Y. 2011), aff'd sub nom. 472 Fed. App'x 11 (2d Cir. 2012); see also S. Union Co. v. Sw. Gas Corp., 165 F. Supp. 2d 1010, 1037 (D. Ariz. 2001) (acknowledging that third party may only be able to enforce some, but not all, provisions of a contract); Orthodontic Affiliates, P.C. v. OrthAlliance, Inc., 210 F. Supp. 2d 1054, 1061 (N.D. Ind. 2002) (holding that the signatories' intent determines whether a third-party beneficiary benefits from all or only some provisions in a contract). Thus, even where a non-signatory is found to be a third-party beneficiary to some provisions in a contract, courts have rebuffed efforts by non-signatories to enforce other contractual provisions,

including arbitration clauses, when the contract indicates that the signatories did not intend for the other contractual provision to benefit the non-signatory. See Republic of Iraq, 769 F. Supp. 2d at 612 (holding that non-signatory, who was a third-party beneficiary to some provisions of contract, could not enforce arbitration clause because plain language of clause reflected intent of signatories that clause could only be enforced by signatories); Wardley Corp. v. Welsh, 962 P.2d 86 (Utah Ct. App. 1998) (holding that because contract used words "party" and "parties" in other provisions to refer only to signatories, it evidenced no intent to benefit broker, who successfully sued for commission as third-party beneficiary, with an award of attorney fees under contract's "prevailing party" provision).

OnTrac cannot, as it must in order to prevail on its motion, demonstrate that it is either a third-party beneficiary to the entire contract or the the arbitration clause, specifically. To begin with, nothing in the SCI Agreement indicates that SCI and the drivers intended OnTrac to benefit from the entire. See generally SCI Agreement. The contract lacks the type of frequently-included provision that explicitly states that a third party is a beneficiary to the entire contract. See, e.g., BioD, LLC v. Amnio Tech., LLC, No. 2:13-CV-1670-HRH, 2014 WL 268575, at *1 (D. Ariz. Jan. 24, 2014) (holding that non-signatory was third-party beneficiary to entire contract where agreement included provision that stated that the non-signatory "shall be a third party beneficiary under this Agreement"). Many of the provisions of the SCI Agreement make no sense if OnTrac were deemed to be a third-party beneficiary to the entire contract. See, e.g., SCI Agreement, at ¶ 1 ("The Owner/Operator agrees to provide SCI its legal business name, DBA(s), and Federal Employer ID Number."); id. at ¶ 7 ("Owner/Operator agrees to present a policy Certificate of Worker's Compensation Insurance or Occupational Accident coverage naming SCI"); id. at ¶ 21 (setting forth the conditions under which Plaintiffs and SCI can terminate the agreement).

Moreover, as demonstrated in OnTrac's supporting declarations, OnTrac and SCI are different companies that serve entirely different purposes. OnTrac is a regional shipping company. See Chase Decl., at ¶ 2 (describing OnTrac as a regional shipping company).

SCI is a third-party administrator that OnTrac uses primarily to process payments to its drivers and RSPs. Id. at ¶¶ 10-11 (describing that OnTrac uses SCI to process payments to RSPs and drivers); Simone Decl., at ¶ 2 (describing SCI as a third-party administrator). The SCI Agreement is therefore not a contract in which OnTrac is designated to stand in SCI's shoes. There is simply no evidence in the SCI Agreement from which the Court could conclude that OnTrac is a third-party beneficiary to the entire contract.

Moving to the arbitration clause itself, the provision's plain language conveys the clear intent of SCI and Plaintiffs that only the signatories to the agreement have the right to force the other party to arbitrate. The arbitration clause states that

> In the event of any dispute, claim, question, or disagreement arising from or relating to this agreement or the breach thereof or service arrangement between Owner/Operator and SCI's clients, the parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement…. [¶] All other disputes, claims, questions, or differences … beyond the jurisdictional maximum for small claims courts … shall be finally settled by arbitration in accordance with the Federal Arbitration Act.

SCI Agreement, at ¶ 26 (emphasis added). The arbitration provision, therefore, applies only to disputes between "the parties hereto." And as a matter of law and logic, "the parties hereto" includes only the signatories to the SCI agreement, which in this case are the Plaintiffs and SCI, not OnTrac.

First, the law is clear that a third-party beneficiary is not a "party" to a contract. See, e.g. Maricopa-Stanfield Irrigation & Drainage Dist. v. Robertson, 211 Ariz. 485, 491 (2005) ("The landowners attempt to overcome the fact that they are not parties to a contract … by arguing that they are third-party beneficiaries" (emphasis added)); Nahom v. Blue Cross & Blue Shield of Arizona, Inc., 180 Ariz. 548, 552 (Ct. App. 1994) ("Under Arizona law, a person who is not a party to a contract can recover under that contract only if he is a primary beneficiary under the terms of the contract itself."); see also CC-Aventura, Inc. v. Weitz Co., LLC, No. 06-21598 CIV, 2007 WL 117935, at *4 (S.D. Fla. Jan. 10, 2007) ("In short, a third party beneficiary is not a party to a contract."); Dixon v. Shasta Beverages, Inc., No. CIV. WDQ-12-0569, 2012 WL 4774808, at *7 (D. Md. Oct. 5, 2012) ("A third party beneficiary is not a party to a contract."); JGB Enterprises, Inc. v. United States, 63

Fed. Cl. 319, 331 (2004), aff'd, 497 F.3d 1259 (Fed. Cir. 2007) ("[A] third-party beneficiary is not a party to a contract"); Peters v. The Keyes Co., 402 Fed. App'x 448, 451 (11th Cir. 2010) ("Non-parties to a contract containing an arbitration clause cannot compel parties to a contract to arbitrate unless it is determined that they are a third party beneficiary to the contract." (quotation marks and citation omitted)). The reference to "parties" in the arbitration provision therefore refers only to the signatories.

Second, the use of the word "hereto"—defined in Black's Law Dictionary as an adverb meaning "to this document," Black's Law Dictionary (10th ed. 2014)—reinforces that only the signatories are bound by the arbitration provision. The parties "to this document" would include only Plaintiffs and SCI.

Third, the use of the words "party," "parties," and "hereto" elsewhere in the SCI Agreement strongly support a reading of the terms that only refers to SCI and the Plaintiffs. The exact phrase "the parties hereto" appears one other time in the Agreement in a recitation stating "the parties hereto have caused this Agreement … to be duly executed the day and year first above written." SCI Agreement, at 5. Pursuant to the "same meaning rule," "if words in one part have a plain and definite meaning but are undefined in another part of a contract, the court will give the words the same meaning in both places." State ex rel. Goddard v. R.J. Reynolds Tobacco Co., 206 Ariz. 117, 122 (Ct. App. 2003). Since only SCI and Plaintiffs "duly executed" the agreement, the term "the parties hereto" in the recitation plainly and definitely refers only to SCI and Plaintiffs; the term should thus be given the same meaning in the arbitration provision. As another example, Paragraph 21 states "[t]he term of this agreement shall commence on the date of the execution of this document by SCI and the Owner/Operator, and shall continue for a period of ninety (90) days, subject to renewals, unless either party desires to cancel this Agreement." See SCI Agreement, at ¶ 21. The listing of SCI and Owner/Operator as the only parties, as well as the use of the word "either," which generally refers only to one of two things, indicate that SCI and Plaintiffs are the only "parties" to the agreement. See id. at ¶ 23 ("This Agreement

may not be altered or amended except by a writing signed by both parties."); id. at ¶ 26 (referring to "both parties" and "either party").

Fourth and finally, SCI clearly knew how to refer to and confer rights on companies like OnTrac, yet failed to do so in the arbitration provision. The SCI Agreement defines the term "Logistics Brokers" as "businesses that market, sell, and provide logistical support for the delivery of tangible items," and the term "Customers" to include all "Logistics Brokers." SCI Agreement, at 1. OnTrac may well fall within the definition of "Logistics Brokers" and "Customers." The arbitration provision, however, refers only to "the parties hereto," which is undefined and, for the reasons discussed above, should be interpreted to mean only the signatories to the contract.[4] SCI Agreement, at ¶ 26. To the extent the term "the parties hereto" is ambiguous, the Court should construe that ambiguity against SCI, the drafter of the agreement. See Abrams v. Horizon Corp., 137 Ariz. 73, 79 (1983) (expressing preference under Arizona law "to construe ambiguities against the drafter"). As the drafter, SCI should not benefit from its failure to explicitly include Logistics Brokers (and thus OnTrac) as beneficiaries of the arbitration provision. Plaintiffs, who are less sophisticated parties to the contract, cannot be left to guess to whom they may be ceding important rights.

In asserting that it is a third-party beneficiary to the arbitration provision, OnTrac primarily relies on four cases in which courts in California, New York, and Michigan have held that OnTrac or other logistics brokers like OnTrac had the right to enforce the same arbitration agreement in SCI's contract with drivers. These cases, of course, are not binding on this Court. And, in any event, all four cases are distinguishable. In Express Messenger Systems Wage and Hour Cases, an action that consolidated eight wage and hour cases brought against OnTrac in California state court, the superior court completely misread the arbitration provision to exclude the term "the parties hereto." See Liang Decl.,

[4] As is discussed below, the reference in the arbitration provision to "SCI's clients" also does not encompass OnTrac. See Section VI, infra.

Dkt. 35-3, Ex. A, at 7. As a result of the court's misreading of the provision, the court's holding that OnTrac was a third-party beneficiary to the arbitration clause is entitled to no weight. And in Greene v. Subcontracting Concepts, LLC, 13-cv-10500 (S.D.N.Y.), Ouedraogo v. A-1 Int'l Courier Service, Inc., 12-cv-05651 (S.D.N.Y), and Southerland v. Corporate Transit America, 13-cv-14462 (E.D. Mich.), the courts granted non-signatory delivery companies' motions to compel arbitration pursuant to the arbitration agreement signed by SCI and delivery drivers, not because the delivery companies were third-party beneficiaries, but on a theory of estoppel because the plaintiffs had baldly asserted SCI and the logistics companies were part of a joint enterprise. Liang Decl., Dkt. 35-3, Ex. B (Greene), at 5-8; id., Ex. C (Ouedraogo), at 4-7; id., Ex. D (Southerland), at 9-13. Plaintiffs here make no such allegations, and OnTrac has not raised any estoppel theory in its motion.[5]

In sum, OnTrac is not a third-party beneficiary to the entire agreement or the arbitration provision. Accordingly, the Court should deny OnTrac's motion to compel because it is not a signatory or third-party beneficiary to the arbitration agreement and therefore cannot enforce it.

[5] Plaintiffs anticipate that in reply, OnTrac will rely on a recent decision from the Western District of Washington, in which a district court held, over the plaintiffs' s five-and-a-half-page opposition that omitted most of the arguments made by Plaintiffs here, that OnTrac was a third-party beneficiary to the arbitration provision in the SCI Agreement. See Ege v. Express Messenger Sys., Inc., No. C16-1167RSL, 2017 WL 87841, at *4 (W.D. Wash. Jan. 10, 2017). The Ege court, unlike the Express Messenger Systems Wage and Hour Cases court, did acknowledge the presence of the term "the parties hereto" as it appears in the arbitration provision. The court's decision that OnTrac is a third-party beneficiary to the arbitration provision is, however, not binding on this court and, more importantly, is wrong. The Ege court ultimately decided that OnTrac "was a third-party beneficiary to the [entire] Agreement," id. at *4, taking an all-or-nothing approach to third-party beneficiary status, which, as Plaintiffs have explained, is inappropriate because the SCI Agreement does not reflect SCI and Plaintiffs' intent that OnTrac was to be a third-party beneficiary to the entire agreement. Moreover, the Ege court erroneously read the contract's reference to "the parties hereto" as only "defin[ing] the contracting parties," rather than as a limit on the entities covered by the arbitration provision. Accordingly, this Court should respectfully part ways with the Ege court and hold that OnTrac is not a third-party beneficiary to the arbitration provision.

VI. THIS DISPUTE DOES NOT FALL WITHIN THE AMBIT OF THE ARBITRATION AGREEMENT

Even if the Court holds that OnTrac is a third-party beneficiary of the arbitration clause (which it is not), this dispute between Plaintiffs and OnTrac is not arbitrable because it is not within the scope of the arbitration provision. A court can order parties to arbitrate "only those disputes … that the parties have agreed to submit" to arbitration. Granite Rock Co. v. Int'l Bd. of Teamsters, 561 U.S. 287, 288 (2010). Here, the plain language of the arbitration provision makes clear that Plaintiffs did not agree to arbitrate their statutory wage and hour claims against OnTrac. The arbitration clause covers "any dispute, claim, question, or disagreement arising from or relating to [1] this agreement or the breach thereof, or [2] service arrangement between Owner/Operator and SCI's clients." SCI Agreement, at ¶ 26.

The first clause does not cover the instant dispute because this wage and hour lawsuit does not "arise[] from or relate[] to" the SCI Agreement. The Ninth Circuit has long held that statutory claims under the FLSA (and by analogy under state wage and hour laws) do not arise under a contract, but rather "exist[] independently of the contract[]." Leyva v. Certified Grocers of California, Ltd., 593 F.2d 857, 862 (9th Cir. 1979). More recently, the Ninth Circuit held in Narayan v. EGL, Inc., 616 F.3d 895, 899 (9th Cir. 2010), a case also involving misclassified drivers, that "[t]he Drivers' claims involve entitlement to benefits under the California Labor Code. Whether the Drivers are entitled to those benefits depends … on the definition that the otherwise governing law—not the parties—gives to the term 'employee.'" The court added that "the claims do not arise out of the contract, involve the interpretation of any contract terms, or otherwise require there to be a contract." Id. Leyva and Narayan control here, where this case solely involves claims regarding OnTrac's compliance with federal and Arizona labor statutes. Plaintiffs' misclassification claims do not, in any way, rest on the SCI Agreement.

The second clause does not apply because, although this dispute does relate to the "service arrangement" between OnTrac and Plaintiffs, on the face of the contract, OnTrac is

not "SCI's client[]." The word "client" is used only once in the entire agreement (in the above-quoted part of the arbitration provision) and is not defined. While it may or may not be true that OnTrac is, in reality, SCI's client,[6] in no way is that apparent from the face of the SCI Agreement. Accordingly, Plaintiffs could not have intended to arbitrate with OnTrac when they signed the contracts. At best, the term "SCI's clients" is ambiguous, meaning that it must be construed against the drafter. See Abrams, 137 Ariz. at 79. The term may well only apply to the RSPs for whom Plaintiffs worked, but guessing in this context is not appropriate. And since the drafter, SCI, clearly knew how to refer to "Logistics Brokers" or "Customers" (which would have encompassed OnTrac), this Court should interpret "SCI's clients" to exclude "Logistics Brokers" and "Customers." Accordingly, because OnTrac is not "SCI's client," Plaintiffs did not agree to arbitrate disputes with OnTrac and OnTrac's motion must be denied.

VII. THE ARBITRATION AGREEMENT IS UNENFORCEABLE BECAUSE IT IS FILLED WITH UNCONSCIONABLE PROVISIONS THAT WOULD MAKE IT IMPOSSIBLE FOR PLAINTIFFS TO VINDICATE THEIR CLAIMS

Even if the Court holds that OnTrac is a third-party beneficiary to the arbitration provision (which it is not) and that the dispute here falls within the scope of the arbitration provision (which it does not), the arbitration provision in the SCI Agreement is unenforceable because it is unconscionable. Clark v. Renaissance W., LLC, 232 Ariz. 510, 512 (Ct. App. 2013) ("An unconscionable contract is unenforceable."). Under Arizona law,

> [t]here are two types of contractual unconscionability: substantive and procedural. Procedural unconscionability addresses the fairness of the bargaining process, which "is concerned with 'unfair surprise,' fine print clauses, mistakes or ignorance of important facts or other things that mean bargaining did not proceed as it should." In contrast, substantive unconscionability addresses the fairness of the terms of the contract itself. A contract may be substantively unconscionable when the terms of the contract are so one-sided as to be overly oppressive or unduly harsh to one of the parties.

[6] Although OnTrac asserts that it "entered into … agreements with SCI and at all times relevant [was an] SCI client," OnTrac Mot. at 5, OnTrac has not submitted any contract between it and SCI.

Id. (citations and footnotes omitted). "A claim of unconscionability can be established with a showing of substantive unconscionability alone." Maxwell v. Fid. Fin. Servs., Inc., 184 Ariz. 82, 90 (1995).

The arbitration provision here is filled with so many substantively unconscionable provisions that it cannot be enforced. See Zaborowski v. MHN Gov't Servs., Inc., 601 F. App'x 461, 464 (9th Cir. 2014) (upholding district court's refusal to sever multiple unconscionable provisions from arbitration clause); Newton v. Am. Debt Servs., Inc., 549 Fed. App'x 692, 695 (9th Cir. 2013) (same); Booker v. Robert Half Int'l, Inc., 413 F.3d 77, 85 (D.C. Cir. 2005) ("[T]he more the employer overreaches, the less likely a court will be able to sever the provisions and enforce the clause."); O'Connor v. Uber Techs., Inc., 150 F. Supp. 3d 1095, 1106 (N.D. Cal. 2015) (holding that severance of unconscionable provisions was unwarranted where arbitration provision was "permeated with unconscionability").

First, the arbitration provision bars Plaintiffs' access to statutory remedies and penalties afforded to them under federal and Arizona law. "Arbitration agreements that fail to provide for all of the types of relief that would otherwise be available in court … are unenforceable." Bormann v. Waxie Enterprises, Inc., No. CIV09-264TUCFRZGEE, 2009 WL 6325693, at *4 (D. Ariz. July 8, 2009), report and recommendation adopted, No. CV09-264-TUC-FRZ, 2010 WL 1346329 (D. Ariz. Mar. 31, 2010) (quotation marks omitted); see also Wernett v. Serv. Phoenix, LLC, No. CIV09-168-TUC-CKJ, 2009 WL 1955612, at *5 (D. Ariz. July 6, 2009). Specifically, under the FLSA and the Arizona law, if Plaintiffs prevail on their claims, Plaintiffs can recover compensatory and liquidated damages. See 29 U.S.C. § 216(b) (providing for unpaid wages and liquidated damages to prevailing FLSA plaintiff); A.R.S. § 23-355 (providing for recovery of treble damages for unpaid minimum wage). The arbitration provision, however, provides that the arbitrator shall "have authority to award actual monetary damages only. No punitive or equitable relief is authorized." SCI Agreement, at ¶ 26. This provision, by limiting Plaintiffs' access to statutorily available remedies, is substantively unconscionable. Indeed, if the provision

were enforceable, it would mean that if the Plaintiffs are found to be employees, unless enjoined, OnTrac would be free to violate the law with impunity.

Second, the arbitration provision is unconscionable because it prohibits Plaintiffs from recovering attorneys' fees from OnTrac if Plaintiffs prevail on their federal and state law claims. See SCI Agreement, at ¶ 26 ("[N]o attorney's fees or other costs shall be granted to either party."). Under Arizona law, such a provision is substantively unconscionable. Bormann, 2009 WL 6325693, at *4.

Third, the arbitration clause is unconscionable because, by requiring that the parties bear their own costs of arbitration (i.e., split the costs of arbitration), it denies Plaintiffs "the opportunity to vindicate [their] … rights." Clark, 232 Ariz. at 512 (quotation marks omitted); Wernett, 2009 WL 1955612, at *7. The cost-sharing provision similarly violates federal law, which prohibits arbitration provisions which, by placing costs on plaintiffs, "effectively foreclose[] vindication of the plaintiffs' federal rights." Chavarria v. Ralphs Grocery Co., 733 F.3d 916, 926 (9th Cir. 2013); see also Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 90 (2000) (federal "effective vindication" rule). Here, the arbitration clause states that "all parties shall bear their own costs for arbitration." SCI Agreement, at ¶ 26. Arbitration of Plaintiffs' individual wage and hour claims before a three-arbitrator panel (as required by the arbitration clause, SCI Agreement, at ¶ 26) in Arizona would likely costs at least $56,000, of which each Plaintiff would be required to bear $28,000. Schleier Decl., at ¶¶ 4-13. All three Plaintiffs lack the financial resources to afford to pay anything close to the expected costs of arbitrating their claims. Meintzer Decl., at ¶¶ 11-18; Candelaria Decl., at ¶¶ 11-18; Ziglar Decl., at ¶¶ 8-10. And the arbitration provision itself provides no mechanism for waiver or reduction of the costs of arbitration based on Plaintiffs' financial hardship. Accordingly, the cost-sharing provision of the arbitration clause is unconscionable because it precludes Plaintiffs from being able to effectively vindicate their rights under federal and Arizona law. Clark, 232 Ariz. at 512-13 (holding that, in determining whether the costs associated with arbitration deny a litigant the opportunity to vindicate their rights, a court must look at the cost of arbitration, the

financial situation of the litigant, and whether the agreement permits waiver or reduction of costs based on hardship); Chavarria, 733 F.3d at 926.[7]

In light of the substantively unconscionable provisions, the Court should hold that the entire arbitration provision is unconscionable and unenforceable. Where a party inserts provisions into a contract that it knows (or should have known) are illegal, especially where the party included the provision to dissuade individuals from exercising their rights, the offending provisions should not be severed. For

> [a]n employer will not be deterred from routinely inserting such a deliberately illegal clause into the arbitration agreements it mandates for its employees if it knows that the worst penalty for such illegality is the severance of the clause after the employee has litigated the matter. In that sense, the enforcement of a form arbitration agreement containing such a clause drafted in bad faith would be condoning, or at least not discouraging, an illegal scheme, and severance would be disfavored unless it were for some other reason in the interests of justice.

Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 124 (2000); see also Graham Oil Co. v. ARCO Prod. Co., a Div. of Atl. Richfield Co., 43 F.3d 1244, 1249 (9th Cir. 1994), as amended (Mar. 13, 1995) (refusing to sever where "offensive provisions clearly represent an attempt by [the drafter] to achieve through arbitration what Congress has expressly forbidden"). As but one example of the application of this principle, in Parada v. Superior Court, 176 Cal. App. 4th 1554, 1586 (2009), the court held that "requiring Petitioners to arbitrate disputes before a panel of three arbitrators from JAMS … would have been so prohibitively expensive as to be unconscionable at the time the … Agreements were signed." The court therefore refused to sever the offending provisions, which the court held were included "deliberately for the improper purpose of discouraging or preventing its customers from vindicating their rights." Id.

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[7] The unconscionability of the cost-sharing provision is underscored by the extent to which Plaintiffs' estimated recoveries would be eclipsed by the costs of arbitration. As supported by the information provided by Plaintiffs regarding their number of hours worked and rates of pay, Plaintiffs' individual damages for minimum wage and overtime violations are unlikely to exceed $28,000. See Meintzer Decl., at ¶¶ 4-9; Candelaria Decl., at ¶¶ 4-9; Ziglar Decl., at ¶¶ 4-6.

The offending provisions here were undoubtedly included to discourage Plaintiffs and other drivers from vindicating their rights. An injured driver contemplating suit might very well forego seeking redress if he or she might be unable to recover all damages to which they are entitled under law and might be responsible for half of the costs of arbitration. See Nesbitt v. FCNH, Inc., 811 F.3d 371, 380–81 (10th Cir. 2016) ("[I]t is unlikely that an employee in [the plaintiff's] position, faced with the mere possibility of being reimbursed for arbitrator fees in the future [if provisions of the agreement are ultimately found unconscionable], would risk advancing those fees in order to access the arbitral forum." (first alteration in original)). And yet, as demonstrated by the case law cited by Plaintiffs above, Arizona law had firmly established that the problematic provisions in the arbitration clause were illegal prior to the time SCI drafted the contracts. The Court can therefore infer that the provisions were included in bad faith in order to discourage lawsuits and should not sever them.

Moreover, the fact that three separate provisions of the arbitration clause are unconscionable on their own counsels against severing them from the agreement. Under such circumstances, finding the entire arbitration provision illegal, rather than severing the specific offending provisions, is the appropriate remedy. Zaborowski, 601 F. App'x at, 464; Newton, 549 Fed. App'x at 695; O'Connor, 150 F. Supp. 3d at 1106.[8]

[8] Although the substantively unconscionable terms provide the Court with sufficient grounds to invalidate the arbitration provision, the SCI Agreement also bears the hallmarks of procedural unconscionability. In particular, OnTrac and SCI's attempts to shoehorn OnTrac into the undefined term "SCI's clients," when no driver could have known the meaning of that term at the time they entered into the agreement, is the type of "unfair surprise" and "ignorance of [an] important fact[]" that constitutes procedural unconscionability. Clark, 232 Ariz. at 512. The procedural unconscionability further supports invalidating the entire arbitration provision.

VIII. THE ARBITRATION PROVISION, WHICH INCLUDES A CLASS ACTION WAIVER, FORCES PLAINTIFFS TO WAIVE THEIR STATUTORY, SUBSTANTIVE RIGHTS UNDER THE NLRA AND FLSA AND IS THEREFORE UNENFORCEABLE

OnTrac also cannot compel Plaintiffs to individually arbitrate their claims because the arbitration provision violates the National Labor Relations Act and Fair Labor Standards Act. Substantive statutory rights—i.e., "rights that are the essential, operative protections of a statute"—"cannot be waived in arbitration agreements." Morris, 834 F.3d at 985. The class action waiver in the arbitration provision forces Plaintiffs to waive their substantive rights under both the NLRA and FLSA, and is therefore unenforceable.

OnTrac's arbitration agreement violates the Sections 7 and 8 of the NLRA, 29 U.S.C. §§ 157 & 158, as interpreted by the Ninth Circuit in Morris, 834 F.3d 975. In Morris, the Ninth Circuit joined the Seventh Circuit in adopting the National Labor Relations Board's ("NLRB") conclusion that "an agreement that precludes [employees] from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial" violates the NLRA. Id. at 980 (quoting D.R. Horton, 357 NLRB No. 184 (2012) ("Horton I"), enf. denied 737 F.3d 344 (5th Cir. 2013) ("Horton II")); see Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016). Here, the class action waiver in the SCI Agreement—which prohibits Plaintiffs from "join[ing] or consolidate[ing] claims … by or against other individuals or entities, or arbitrat[ing] any claims as a representative member of a class," SCI Agreement at ¶ 26[9]—precludes Plaintiffs from being a part of a class or collective action and thus violates the NLRA.

Similarly, the class action waiver violates Plaintiffs' rights under the FLSA to participate in a collective action. See 29 U.S.C. § 216(b). Although it is an open question

[9] The waiver is, on its face, limited only to arbitrations. However, the SCI Agreement requires that all disputes above the jurisdictional maximum for small claims court be submitted to arbitration. Since, under the contract, arbitration is the sole forum for litigating disputes against SCI, class and collective proceedings are functionally prohibited in all forums.

in the Ninth Circuit, the right of a plaintiff to initiate or join a collective action pursuant to Section 216(b) of the FLSA is a substantive, unwaivable right. See Gaffers v. Kelly Services, Inc., --- F. Supp. 3d ---, 2016 WL 4445428, at *8-10 (E.D. Mich. Aug. 26, 2016). Plaintiffs recognize that a collective action is, obviously, a procedure. Nonetheless, an individual's right to participate in such an action is substantive, not procedural, because it is central to the enforcement scheme of the FLSA. Gaffers, 2016 WL 4445428, at *9. Specifically,

> rights under the FLSA … cannot be waived, since allowing employees to waive those rights (and thereby permitting employers to induce employees to do so), would give employers who manage to secure such waivers a substantial economic advantage over their competitors, and that outcome is the exact result that the FLSA's uniform wage regulations were enacted to prevent.

Id. at *9 (citing Killion v. KeHE Distributors, LLC, 761 F.3d 574, 592 (6th Cir. 2014)). See also 29 U.S.C. § 202(a) (identifying as a purpose of the FLSA the prohibition of unfair working conditions that create "unfair … competition in commerce"); Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27, 36 (1987) (holding that the FLSA "reflects Congress' desire to eliminate the competitive advantage enjoyed by goods produced under substandard conditions"); Lerwill v. Inflight Servs., Inc., 379 F. Supp. 690, 696 (N.D. Cal. 1974), aff'd, 582 F.2d 507 (9th Cir. 1978) ("The [FLSA] serves a public and a private purpose. Its enforcement provisions are intended to protect workers and their families, … but it is also intended to protect the employers who comply with its terms." (citations omitted)). Because of the purpose of the FLSA to level the playing field,

> [t]he right to pursue litigation collectively to recover unpaid overtime is no different in this respect than the right to receive overtime pay, because the employer that absconds from collective litigation of such claims secures for itself the same unfair competitive advantage that it would by refusing to pay at the required rates in the first instance.

Gaffers, 2016 WL 4445428, at *9.[10] The class action waiver in the SCI Agreement, which waives Plaintiffs' substantive right to participate in a collective action, therefore also violates the FLSA. See id. at *9-10.

Recognizing that Morris is binding on this Court, OnTrac argues that the SCI Agreement's arbitration provision is nevertheless enforceable because OnTrac drivers are labeled as independent contractors in the SCI Agreement, and only employees are protected by the NLRA. OnTrac Mot. at 12 n.5. Although OnTrac did not anticipate Plaintiffs' FLSA argument, OnTrac likely will put forward the same specious rationale to shield the arbitration provision from illegality under the FLSA. OnTrac, however, is (and would be) wrong.[11]

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[10] Plaintiffs acknowledge that a number of circuit courts have found that the right under the FLSA to initiate or join a collective action is procedural, rather than substantive, and is therefore waivable. See, e.g., Sutherland v. Ernst & Young LLP, 726 F.3d 290, 296-97 (2d Cir. 2013); Walthour v. Chipio Windshield Repair, LLC, 745 F.3d 1326, 1335 (11th Cir. 2014); Adkins v. Labor Ready, Inc., 303 F.3d 496, 503 (4th Cir. 2002); Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294, 298 (5th Cir. 2004). However, none of these decisions considered "one of the principal rationales for precluding employers from contracting around an employee's FLSA rights: that 'an employer...gains a competitive advantage by doing so.'" Gaffers, 2016 WL 4445428, at *8 (distinguishing Walthour, 303 F.3d 496). When this purpose of the FLSA is properly accounted for, it becomes clear, as held in Gaffers, that the right to participate in an FLSA collective action is substantive and unwaivable.

[11] OnTrac also asserts, in one sentence without any explanation or citation to authority, that "even if the holding of Morris was somehow applied here, Plaintiffs' agreements to arbitrate would not be invalidated by the NLRA because Plaintiffs had the right to opt-out of the Arbitration Provision." OnTrac Mot. at 12 n.5. Plaintiffs will explain why an opt-out provision cannot rescue the otherwise-illegal class action waiver if and when OnTrac actually makes such an argument. This Court, however, will never need to reach this legal dispute because, notwithstanding OnTrac's repeated representations to the contrary, the SCI Agreement does not contain an opt-out provision.

As a starting point, OnTrac implicitly concedes, as it must, that the SCI Agreement itself does not contain an opt-out provision. Rather, to prove the existence of the Plaintiffs' right to opt out, OnTrac relies on a provision in an "Independent Contractor Acknowledgement Form," which all of the Plaintiffs did sign. See Simone Decl., Exs. B, D, F. In very small type in the very last paragraph, the Acknowledgement Form states "[y]ou understand you may opt out of the Arbitration provision within the Owner Operator Agreement by notifying SCI in writing, and by not opting out you are subject to the arbitration and class action waiver provisions contained therein." Id.

OnTrac has not, however, produced any theory regarding how or why the Acknowledgement Form has any legal effect whatsoever. The Acknowledgement Form is not countersigned by any party, including SCI or OnTrac. Moreover, nothing in the

(Continued...)

In making this argument, OnTrac asks this Court to decide, at this very early stage, the ultimate issue in this case against the drivers, i.e. assume that they are properly classified as independent contractors, and compel individual arbitration. The Court, however, cannot force Plaintiffs to arbitrate this question on an individual basis, and thus deprive them of their rights under the FLSA and NLRA, simply on the ground that they have not yet obtained a determination that they are in fact employees. Such circular reasoning would deprive the drivers of making this challenge to their classification on a classwide basis, which itself would violate the FLSA (as interpreted in Gaffers) and NLRA (as interpreted in Morris).

Instead, for purposes of determining the applicability of the NLRA and FLSA, the Court can and should presume (as other courts have) that Plaintiffs are employees. See, e.g., Curtis v. Contract Mgmt. Servs., 2016 WL 5477568, at *7 (D. Me. Sept. 29, 2016) ("I assume for the sake of this motion that the employer/employee relationship exists"); Bekele v. Lyft, Inc., 2016 WL 4203412, at *21 (D. Mass. Aug. 9, 2016) (assuming, in case alleging misclassification of workers as independent contractors and for purposes of deciding whether class action waiver violates NLRA, that workers were employees). Alternatively, if the Court believes this issue needs to be resolved at this early stage, the Court could, in conjunction with proceedings to determine if Plaintiffs are exempt from the FAA, make a

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(...Continued)

Acknowledgement Form or the SCI Agreement suggests, let alone states, that the Acknowledgement Form is incorporated into or made a part of the SCI Agreement. In fact, the opposite is true. The SCI Agreement explicitly provides that "[t]his Agreement shall constitute the entire Agreement between the parties and shall supersede any other written or oral agreement between the parties with respect to the subject matter hereof." SCI Agreement, at ¶ 23. It further states that "[t]his Agreement may not be altered or amended except by a writing signed by both parties." Id. (emphasis added). In light of these two provisions, the only possible conclusion is that the SCI Agreement, which does not contain an opt-out provisions, governs SCI's and Plaintiffs' relationships and respective rights regarding arbitration. Plaintiffs' acknowledgement of a mythical opt-out provision that does not actually exist, on the other hand, is completely meaningless. Thus, whether an opt-out provision might somehow alter the analysis regarding whether the arbitration clause violates the FLSA or NLRA is beside the point because there is no contractual right for Plaintiffs to opt out.

preliminary determination regarding employee status after permitting the parties limited discovery.[12]

IX. CONCLUSION

For the foregoing reasons, the Court should deny OnTrac's motion to dismiss or, alternatively, stay proceedings, and compel arbitration.

Respectfully submitted this 27th day of January, 2017,

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[12] OnTrac asserts that Morris and Lewis have no application because "Morris and all cases in both the Ninth and Seventh circuits in which … the D.R. Horton rationale has been adopted involved acknowledged employment relationships, not alleged employment relationships based on the supposed 'economic reality', and certainly did not involve instances in which the parties entered into written agreements expressly characterizing the plaintiff as an independent contractor." OnTrac Mot. at 12 n.5. OnTrac does not, however, cite (nor could it) to any cases in which a court refused to apply Morris or Lewis to a worker labeled as an independent contractor because, as far as Plaintiffs' counsel is aware, no such case exists. And, in fact, at least one court, Curtis, 2016 WL 5477568, at *7, (albeit not within OnTrac's arbitrarily defined area of the Seventh and Ninth circuits) has already held that Morris applies in a case involving workers labeled as independent contractors. Moreover, the Ninth Circuit has repeatedly held that economic realities, not labels, govern whether a worker is an employee. See, e.g., Real, 603 F.2d at 755. Put simply, if Plaintiffs are, in reality, OnTrac's employees, the FLSA and NLRA apply and nothing in Morris, Lewis, or any other case holds to the contrary.

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2016, a true copy of this document was filed via CM/ECF, which will provide notice to all counsel of record.

/s/ Harold Lichten

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-2005-NYW

DAVID WARD and
LISA STUMMEIER, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

EXPRESS MESSENGER SYSTEMS, INC. d/b/a ONTRAC, and
J&B TRANSPORTATION, INC.,

Defendants.

ORDER ON MOTION TO COMPEL ARBITRATION

Magistrate Judge Nina Y. Wang

This matter comes before the court on Defendants Express Messenger Systems, Inc. d/b/a OnTrac ("OnTrac") and J&B Transportation, Inc.'s ("J&B") (collectively, "Defendants") Motion to Dismiss Opt-in Plaintiffs Bound by Non-Disclosure and Dispute Resolution Agreement and Compel Their Claims to Arbitration ("Motion" or "Motion to Compel Arbitration"), filed on November 2, 2018. [#93].[1] The undersigned considers the Motion pursuant to 28 U.S.C. § 636(c) and the Order of Reference dated September 25, 2017 [#18]. The court concludes that oral argument will not materially assist in the resolution of this matter. Having considered the Motion and associated briefing, the applicable case law, and the entire docket, the court **DENIES** the

[1] Defendants' Reply argues that Plaintiffs did not meaningfully confer prior to filing their Response given that they originally consented to the Motion, and characterizes the Response as filed in bad faith, justifying an award of Defendants' fees and costs in moving to compel arbitration. *See* [#97 at 1-5, 10]; *see also* [#93 at 20 & n. 21, 22]. Though recognizing Defendants' frustrations, for reasons explained herein, the court does not find that Plaintiffs filed their Response in bad faith; nor does the court find fees and costs appropriate. Nevertheless, the court once again encourages the Parties to engage in robust conferrals, particularly when positions are reconsidered and/or changed.

Motion to Compel Arbitration.

BACKGROUND

The court discussed the background of this case in detail in its Order on Motion for Conditional Certification as a Collective Action issued on April 3, 2018, and will discuss it here only as it pertains to the instant Motion. *See* [#47]. Plaintiffs initiated this action on behalf of themselves and all other similarly situated persons that are or were drivers for Defendants within the last three years and classified as independent contractors. *See generally* [#8]. The court granted in part Plaintiffs' Motion for Conditional Certification, and directed the Parties to meet and confer regarding a proposed Notice and Consent Form for putative opt-in plaintiffs that "personally performed transportation services for J&B involving the delivery of OnTrac shipments" in Colorado. *See* [#47].

On May 15, 2018, the court issued the Court-Authorized Notice and Consent Form to be mailed to putative opt-in plaintiffs. [#60; #60-1]. Per the court's Order, the Notice covered putative opt-in plaintiffs working for Defendants in the 3 years prior to the date of the Notice, and provided for a 60-day opt-in period. *See* [#60]. The Parties then appeared before the court for a Status Conference on June 20, 2018, at which Plaintiffs discussed their intent to file a motion seeking corrective and supplemental Notice after learning of OnTrac's dissemination of a Non-Disclosure and Dispute Resolution Agreement ("NDRA"). *See* [#65].

Relevant here, under the NDRA's title an enlarged disclaimer reads:

> This Agreement is a binding contract that addresses important legal issues. Entering into the Agreement, in particular, the Arbitration Provision, will affect your legal rights. It is your sole responsibility to read and understand it. You are free to seek assistance or advice from an advisor of your choice before signing the Agreement if you so choose.

[#69-1 at 16 (emphasis in original)]. Pursuant to the NDRA's "Dispute Resolution (Arbitration

Provision)," disputes arising out of (1) the NDRA, (2) the relationship between a driver and OnTrac, (3) the driver's performance of OnTrac services, and (4) the interpretation and enforceability of the Arbitration Provision shall proceed to individual arbitration. [*Id.* at 19]. Specifically, the Arbitration Provision provides,

> **Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or any other forum other than arbitration, and requires all such disputes to be resolved on an individual basis and only by an arbitrator through final and binding arbitration and not by way of a court or jury trial, nor a proceeding before any other governmental body, and not by way of a class, collective or representative action or proceeding.**

[*Id.* (emphasis in original)]. The NDRA also requires drivers to waive their rights to participate in or join class or collective actions against OnTrac, including collective arbitration, unless the driver joined such actions prior to signing the NDRA. *See* [*id.* at 20].[2] But drivers may opt out of the Arbitration Provision by "notifying [OnTrac] in writing" (signed and dated) within "30 days of [driver's] execution of the [NDRA]." [*Id.* at 22].

Because of the NDRA, Plaintiffs moved for the issuance of a corrective and supplemental notice, arguing that the NDRA confused drivers of their rights to participate in this litigation or deterred them from doing so. *See* [#69; #78]. The court granted in part the Motion for Corrective and Supplemental Notice, authorizing Plaintiffs to re-send the original Notice and Consent Form, with an additional 30-day opt-in window, to drivers whose Notice and Consent Form was returned undeliverable and to those drivers who worked for Loyalty Delivery Services. *See* [#85]. There are currently 14 plaintiffs in this matter.[3]

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[2] The United States Supreme Court recently held that such waivers in arbitration agreements does not render those agreements illegal or unenforceable. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621-32 (2018).

[3] This includes the two named Plaintiffs, David Ward and Lisa Stummeier, and 12 opt-in plaintiffs: Nita Sheldon [#1-1 at 2], Melissa McCoy [#1-1 at 3], Daniel Ballard [#63-1], Chris Chatman [#64-

Now, Defendants seek to dismiss and compel to arbitration opt-in plaintiffs Chris Chatman, Luz Garcia Lopez, Roberto Ortega, and James Peterson (collectively, the "NDRA Plaintiffs") given that each executed the NDRA prior to joining this collective action. *See* [#93 at 1, 5-6]. Despite the initial appearance that Plaintiffs did not oppose the Motion, *e.g.*, [#93-3 at ¶ 2; #97-1 at ¶2], Plaintiffs have since responded, including a sur-reply with leave of the court, in opposition to the Motion. Plaintiffs argue that the NDRA Plaintiffs are transportation workers and are exempt from the Federal Arbitration Act; if not, the court should stay this matter as to the NDRA Plaintiffs pending arbitration rather than dismiss them. *See* [#95; #104-1]. The Motion is now ripe, and I consider the Parties' arguments below.

LEGAL STANDARD

The Federal Arbitration Act ("FAA") provides that contractual agreements to arbitrate disputes "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 3 of the FAA obliges courts to stay litigation on matters that the parties have agreed to arbitrate; and section 4 authorizes a federal district court to compel arbitration for a dispute over which it would have jurisdiction. 9 U.S.C. §§ 3, 4. But because "arbitration is a matter of contract," the court cannot require a party "to submit to arbitration any dispute which he has not agreed so to submit." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (citation omitted). For this reason, courts "should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago,*

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1 at 1], George Ball [#64-1 at 2], Taylor Pryor [#64-1 at 3], Jonathan Peasch [#66-1 at 1], Stephanie McClain [#66-1 at 2], Tommy McClain [#66-1 at 3], James Peterson [#72-1], Luz del Carmen Garcia [#73-1 at 1], and Roberto Ortega [#73-1 at 2]. The Parties confirmed this count during the Status Conference held on August 16, 2018. [#82]. Since that time, Plaintiffs have filed a Notice of Filing Opt-in Forms for two additional individuals, *see* [#84], but the court has since dismissed Matthew Oldenburg and Henrik Dilanian as improper opt-in plaintiffs, *see* [#102].

Inc. v. Kaplan, 514 U.S. 938, 944 (1995). The party seeking to compel arbitration bears the burden of establishing that the matter at issue is subject to arbitration. *See Hancock v. Am. Tel. & Tel. Co., Inc.,* 701 F.3d 1248, 1261 (10th Cir. 2012); *GATX Mgmt. Servs., LLC v. Weakland*, 171 F. Supp. 2d 1159, 1162 (D. Colo. 2001).

Courts typically apply a two-step inquiry when questioning the enforceability of an arbitration clause: (1) did the parties agree to arbitrate the dispute; and (2) if so, are there "legal constraints external to the parties' agreement [that] foreclose[] the arbitration of those claims." *Williams v. Imhoff*, 203 F.3d 758, 764 (10th Cir. 2000). An arbitration agreement is enforceable if there exists a valid agreement to arbitrate, and if the dispute falls within the scope of that agreement. *See National American Insurance Co. v. SCOR Reinsurance Co.*, 362 F.3d 1288, 1290 (10th Cir. 2004). "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Riley Manufactoring Co., Inc. v. Anchor Glass Container Corp.*, 157 F.3d 775, 779 (10th Cir. 1998).

ANALYSIS

For purposes of the instant Motion, the Parties do not dispute that they agreed to arbitrate their disputes under the NDRA, nor do Plaintiffs necessarily challenge the legal validity of the NDRA and its Arbitration Provision. Rather, the Parties' specific dispute concerns whether the NDRA Plaintiffs, as drivers for J&B delivering OnTrac shipments in Colorado, are exempt from the FAA as transportation workers. *Compare* [#95; #104-1] *with* [#97]. For the following reasons, I respectfully conclude that the NDRA Plaintiffs (like all Plaintiffs) are transportation workers and are therefore exempt from the FFA.

The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements[,]" and reflects a "liberal policy favoring arbitration[.]" *AT&T Mobility LLC v.*

Concepcion, 563 U.S. 333, 339 (2011) (internal citations and quotation marks omitted). But despite this liberal policy, § 1 of the FAA excludes certain workers from its ambit. Pertinent here, § 1 states, "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Courts generally construed § 1's exclusions narrowly "to include only employees actually engaged in the channels of foreign or interstate commerce[.]" *See, e.g.*, *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998) (agreeing with courts holding the same). "Vindicating the *McWilliams* view, the [Supreme Court of the United States] held that the FAA excludes only employment contracts of *transportation workers* engaged in foreign or interstate commerce." *Int'l Bhd. of Elec. Workers, Local #111 v. Pub. Serv. Co. of Colorado*, 773 F.3d 1100, 1106 (10th Cir. 2014) (emphasis in original) (citing *Circuit City Stores, Inc. v. Adams ("Circuit City")*, 532 U.S. 105, 119 (2001)).

In *Circuit City* the Supreme Court rejected the notion that "contracts of employment of . . . any other class of workers engaged in . . . commerce" excluded *all* employment contracts from the FAA. *See* 532 U.S. at 113-14. Instead, the Supreme Court explained, canons of statutory construction suggested that courts should give effect to the terms "seamen" and "railroad employees," which narrowed the category of "any other class of workers" to transportation workers. *See id.* at 114-15, 119. Further, the Supreme Court found significant the use of "engaged in . . . commerce," which implied that Congress did not intend to regulate to the outer limits of its Commerce Clause authority. *See id.* at 115-18. Thus, the Supreme Court held that, in addition to "seamen" and "railroad employees," § 1 "exempts from the FAA only contracts of employment of transportation workers"—a conclusion in accord with "Congress'[s] demonstrated concern with transportation workers and their necessary role in the free flow of goods" in interstate commerce.

See id. at 119, 121.

Recently, the Supreme Court further refined the applicability of § 1 to transportation workers. *See New Prime, Inc. v. Oliveira ("New Prime")*, --- S. Ct. ----, No. 17-340, 2019 WL 189342 (U.S. Jan. 15, 2019).[4] Specifically, the Supreme Court considered two questions: (1) "When a contract delegates questions of arbitrability to an arbitrator, must a court leave disputes over the application of § 1's exception for the arbitrator to resolve?" and (2) "[D]oes the term 'contracts of employment' refer only to contracts between employers and employees, or does it also reach contracts with independent contractors?" *Id.* at *3. Concerning the first question, the Supreme Court concluded that the FAA's "terms and sequencing" bestowed courts with the authority to decide in the first instance whether § 1's exclusions applied. *See id.* at *4-5 (explaining that this adhered to the court's authority to determine initially whether an agreement to arbitrate existed). As to the second question, the Supreme Court held that "contracts of employment," as ordinarily understood in 1925 when Congress passed the FAA, "mean[s] nothing more than an agreement to perform work[,]" which encompasses "not only agreements between employers and employees but also agreements that require independent contractors to perform work." *Id.* at *6. The Supreme Court found support for this conclusion in Congress's use of the term "workers" (as

[4] There the plaintiff worked as a truck driver for the defendant, an interstate trucking company. The employment contract between the plaintiff and the defendant purported to establish the plaintiff as an independent contractor, and subjected the parties to binding arbitration. The plaintiff alleged that, despite all this, the defendant failed to pay its drivers proper wages under the Fair Labor Standards Act, and that the plaintiff was exempt from arbitration because he was a transportation worker. The Court of Appeals for the First Circuit held that the court, not the arbitrator, was to determine the applicability of § 1's transportation worker exception and that the term "contract of employment" covered not only contracts establishing an employer-employee relationship but also those purporting to establish an independent contractor relationship. *See Oliveira v. New Prime, Inc.*, 857 F.3d 7, 9-12, 15, 16-24 (1st. Cir. 2017). The Supreme Court granted certiorari to consider these issues. *See New Prime, Inc. v. Oliveira*, 138 S. Ct. 1164, 200 L. Ed. 2d 313 (2018).

in "any . . . class of workers") as opposed to "employees" or "servants," and rejected the notions that "contracts of employment" necessarily meant employer-employee relationships or that courts could nonetheless order arbitration for transportation workers in conformance with the liberal policy favoring arbitration. *See id.* at *7-10.

Applying the above principles to this matter leads the court to conclude that the NDRA Plaintiffs are exempt from the FAA. First, as *New Prime* indicates, it is for this court to decide whether § 1's exclusions apply to the NDRA Plaintiffs. Second, regardless of the Parties' divergent theories concerning an employer-employee or independent contractor relationship, § 1 applies to the "contracts of employment" at issue in this matter. *See New Prime*, 2019 WL 189342, at *6-10. Thus, the remaining issue for the court to decide is whether the NDRA Plaintiffs constitute transportation workers. I find that they do.

Despite its pronunciation in *Circuit City* that § 1 applied only to "seamen," "railroad employees," and "transportation workers," the Supreme Court did not define transportation worker. *See* 532 U.S. at 109, 119, 121. Various courts to consider the issue have concluded that a transportation worker generally works in the transportation industry and directly engages in the movement of goods in interstate commerce or works so closely to the movement of goods in interstate commerce as to be in practical effect part of it. *E.g.*, *Int'l Bhd. of Teamsters Local Union No. 50 v. Kienstra Precast, LLC*, 702 F.3d 954, 957 (7th Cir. 2012) (holding that the union-plaintiff's workers were transportation workers because they transported loads of goods across state lines); *Lenz v. Yellow Tranps. Inc.*, 431 F.3d 348, 351-52 (8th Cir. 2005) (holding that a customer service representative, though working in trucking industry, was not actually involved in flow of goods in interstate commerce); *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 593 (3d Cir. 2004) (holding that the plaintiff, a field service supervisor in Philadelphia for the defendant-

shipping company, was a transportation worker because she supervised the delivery of goods in interstate commerce); *Harden v. Roadway Package Sys., Inc.*, 249 F.3d 1137, 1140 (9th Cir. 2001) ("As a delivery driver for RPS, Harden contracted to deliver packages 'throughout the United States, with connecting international service.' Thus, he engaged in interstate commerce that is exempt from the FAA."). Indeed, the United States Court of Appeals for the Tenth Circuit ("Tenth "Circuit") adheres to this approach. *See, e.g.*, *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1233 (10th Cir. 1999) (concluding that a janitor was not directly engaged in the channels of interstate commerce despite the employer's services "affect[ing] interstate commerce at some level"); *McWilliams*, 143 F.3d at 574, 576 (holding that a "work area controller" that sold computer simulated military exercises throughout the United States did not directly affect the channels of interstate commerce).

Defendants contend that the NDRA Plaintiffs, like all Plaintiffs, are not transportation workers because they did not move goods in interstate commerce; they instead made only intrastate deliveries in Colorado. *See* [#97 at 6-7 & n. 2]. Plaintiffs counter that they are all transportation workers because they are all drivers in the transportation industry, and though they may not have transported goods across state lines, they directly engaged in the movement of goods in interstate commerce. *See* [#104-1 at 2-3]. For the following reasons, I agree with Plaintiffs.

The court finds several cases persuasive on this point. First, in *Palcko v. Airborne Express, Inc.*, the Third Circuit held that the plaintiff, a field supervisor, who supervised drivers for defendant, a package transportation and delivery company that engaged in intrastate, interstate, and international shipping, was a transportation worker despite no evidence that the plaintiff delivered packages or that the drivers she supervised ever made deliveries outside the Philadelphia metropolitan area. *See* 372 F.3d at 590, 593 (finding the "direct supervision of package shipments

makes [the plaintiff's] work so closely related [to interstate and foreign commerce] as to be in practical effect part of it." (first brackets added; internal quotation marks omitted)). The Third Circuit rejected the contention that transportation workers are only those "who physically transported goods across state lines," because had Congress intended as much, "it would have phrased the FAA's language accordingly." *Id.* at 593-94.

Second, drawing from *Palcko*, a court in this District concluded that the plaintiff who was a driver for the defendant, a company that transported currency across state lines, was a transportation worker. *See Christie v. Loomis Armored US, Inc.*, No. 10-CV-02011-WJM-KMT, 2011 WL 6152979, at *3 (D. Colo. Dec. 9, 2011). Because the plaintiff transported currency, "a good that is undisputedly in the stream of interstate commerce," the court held that the plaintiff was a transportation worker exempt from the FAA under § 1, even though there was no evidence that the plaintiff transported currency across state lines. *See id.*

Finally, in *Lenz v. Yellow Transportation, Inc.*, the Eighth Circuit explained, "[i]ndisputably, if [the plaintiff] were a truck driver, he would be considered a transportation worker under § 1 of the FAA." 431 F.3d at 351 (citing *Harden v. Roadway Package Sys., Inc.*, 249 F.3d 1137 (9th Cir. 2001)). The Eighth Circuit went on to identify eight non-exhaustive factors that may guide the court's inquiry into the matter, including whether:

1. the employee works in the transportation industry;
2. the employee is directly responsible for transporting the goods in interstate commerce;
3. the employee handles goods that travel interstate;
4. the employee supervises employees who are themselves transportation workers, such as truck drivers;
5. like seamen or railroad workers, the employee is within a class of employees for which special arbitration already existed when Congress enacted the FAA;
6. the vehicle itself is vital to the commercial enterprise of the employer;
7. a strike by the employee would disrupt interstate commerce; and
8. the nexus that exists between the employee's job duties and the vehicle the employee uses in carrying out his duties (i.e., a truck driver whose only job is

to deliver goods cannot perform his job without a truck).

See id. at 352.[5]

Here, Plaintiffs are all drivers for J&B and delivered OnTrac shipments in Colorado, using either their own vehicle or one provided by Defendants. *See* [#8 at ¶¶ 32, 34, 36, 38-39, 42-44; #37-6 at ¶¶ 10, 13-14, 16, 17, 19, 22; #37-7 at ¶¶ 6, 9-10, 12-15; #37-8 at ¶¶ 2-3, 5, 6, 9, 12, 13]. OnTrac is a Delaware corporation that "provides regional same-day and overnight package delivery services within Arizona, California, Nevada, Oregon, Washington, Utah, Colorado[,] and Idaho" for customers such as Amazon, Staples, and various pharmaceutical companies. [#8 at ¶¶ 15, 19; #37-6 at ¶ 6; #40-1 at ¶ 2]. J&B is a Colorado corporation that "provides regional same-day and overnight package delivery services for Ontrac's [sic] customers within Colorado," and has expended its operations into New Mexico, Wyoming, and Minnesota. *See* [#8 at ¶¶ 2, 16, 20; #37-7 at ¶ 3; #40-2 at ¶¶ 2, 6].

Based on the foregoing, I find that Plaintiffs work in the transportation industry, are directly responsible for transporting goods in interstate commerce, handle goods that travel in interstate commerce, use vehicles that are vital to the commercial enterprises of Defendants, are employees that would disrupt the flow of interstate commerce if they went on strike, and cannot perform their job duties without the use of their own or Defendants' vehicles. This is sufficient to deem Plaintiffs transportation workers. *Cf. Zamora v. Swift Transp. Corp.*, No. EP-07-CA-00400-KC, 2008 WL 2369769, at *4-9 (W.D. Tex. June 3, 2008) (concluding that a Terminal and Planning Manager for

[5] Though not formally adopted by the Tenth Circuit, the *Lenz* court drew these factors from *Lorntzen v. Swift Transportation, Inc.*, 316 F.Supp.2d 1093, 1097 (D. Kan. 2004). And at least two other courts in this Circuit have applied the *Lenz* factors. *See Bell v. Ryan Transp. Serv., Inc.*, 176 F. Supp. 3d 1251, 1255-58 (D. Kan. 2016) (holding that a freight broker for a logistics company was not a transportation worker); *Wallace v. Yellow Transp., Inc.*, No. CIV-05-1213-T, 2006 WL 8436597, at *2-3 (W.D. Okla. Aug. 8, 2006) (holding that a docket supervisor was not a transportation worker).

a large trucking company was a transportation worker under the *Lenz* factors). This is so even in the absence of any indication that Plaintiffs transported goods across state lines. *See Diaz v. Mich. Logistics Inc.*, 167 F. Supp. 3d 375, 380 n.3 (E.D.N.Y. 2016) ("Plaintiffs sufficiently allege that they were engaged in interstate transportation, notwithstanding that they did not actually drive across state lines, as Plaintiffs were directly responsible for transporting and handling automotive parts that allegedly moved in interstate commerce—the heart of Defendants' business." (citing *Christie*, 2011 WL 6152979, at *3)).

Accordingly, the NDRA Plaintiffs, as transportation workers, are exempt from the FAA under § 1. And for this reason, the court does not conclude that Plaintiffs filed their Response to the Motion to Compel Arbitration in bad faith; thus, the court concludes that Defendants are not entitled to fees and costs associated with bringing the instant Motion.

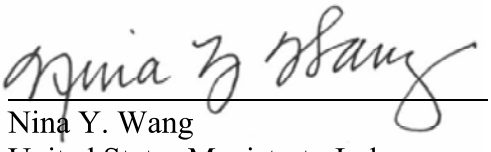
CONCLUSION

Therefore, **IT IS ORDERED** that:

(1) Defendants' Motion to Compel Arbitration [#93] is **DENIED**.

DATED: January 28, 2019

BY THE COURT:



Nina Y. Wang
United States Magistrate Judge

EXHIBIT C

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BERNADEAN RITTMANN, *et al.*, Plaintiffs, v. AMAZON.COM, INC., *et al.*, Defendants.	CASE NO. C16-1554-JCC ORDER

This matter comes before the Court on Defendants' motion to compel arbitration (Dkt. No. 36). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES the motion for the reasons explained herein.

I. BACKGROUND

Plaintiffs are delivery drivers working for Defendants Amazon.com or Amazon Logistics. (Dkt. No. 76 at 1.) Plaintiffs are parties to individual contracts with Defendants (collectively, the "contract"), and Defendants have classified Plaintiffs as independent contractors.[1] (*Id.*) Of the tens of thousands of putative class members, all but approximately 165 are parties to a contract

[1] There are actually two relevant types of contracts at issue, but they are substantively the same. (*Compare* Dkt. No. 37-1 at 4–5, *with* Dkt. No. 37-2 at 6–7.) Any reference in this order to the terms of one type of contract is applicable to the other.

with Defendants containing a provision mandating individual arbitration (the "Arbitration Provision"). (*See* Dkt. Nos. 49 at 4, 77 at 2, 37-1, 37-2.) The Arbitration Provision further mandates that the Federal Arbitration Act ("FAA") will govern any disputes arising between the parties. (*See* Dkt. Nos. 37-1 at 5, 37-2 at 7.)

Directly after the contract's Arbitration Provision, a provision entitled "Governing Law" (the "Governing Law Provision") states: "These Terms are governed by the law of the state of Washington without regard to its conflict of laws principles. However, the preceding sentence does not apply to [the Arbitration Provision], which is governed by the Federal Arbitration Act and applicable federal law." (Dkt. No. 37-1 at 5.)

At the heart of Plaintiffs' complaint is their allegation that Defendants have misclassified Plaintiffs as independent contractors instead of employees. (*See* Dkt. No. 83.) Simultaneous to when this lawsuit was filed, the Ninth Circuit and the United States Supreme Court were poised to answer questions relevant to the arbitrability of Plaintiffs' claims. (*See* Dkt. No. 77.) As a result, the Court stayed this action, pending those decisions. (*Id.*) Those questions have now been answered, and the parties stipulate to a partial lift of the stay so that the Court can determine the arbitrability of Plaintiffs' claims. (*See* Dkt. Nos. 100, 101.)

II. DISCUSSION

A. Federal Arbitration Act

Arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 ("Section 2"). The Supreme Court has held that Section 2 should be construed broadly to "provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause." *Perry v. Thomas*, 482 U.S. 483, 490 (1987). Because of the FAA's broad reach, the Court is limited to "determining (1) whether a valid agreement to arbitrate exists, and if it does, (2) whether the agreement encompasses the dispute at issue." *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008) (quoting *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130

(9th Cir. 2000)). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

Plaintiffs argue that there is no valid agreement to arbitrate because the Arbitration Provision is unenforceable, as Plaintiffs fall within the exemption to the FAA codified at 9 U.S.C. § 1 ("Section 1" or the "transportation worker exemption").[2] (Dkt. Nos. 46, 104, 107.) Section 1 exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The parties dispute whether Plaintiffs are engaged in interstate commerce.[3] (Dkt. Nos. 103, 104, 107, 108.)

In contrast to Section 2, Section 1 is construed narrowly. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001) ("The plain meaning of the words 'engaged in commerce' is narrower than the more open-ended formulations 'affecting commerce' and 'involving commerce.'"). As a result, many courts in the Ninth Circuit have construed the transportation worker exemption to require a stricter association between the employee and interstate commerce than might otherwise be required under other legislation. *See, e.g.*, *Magana v.*

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[2] In their initial briefing, Plaintiffs made two additional arguments that are without merit. (*See* Dkt. Nos. 46 at 15–21, 62 at 22.) First, they argued that the Arbitration Provision is unenforceable because it contains a class action waiver, in violation of the National Labor Relations Act ("NLRA"). (Dkt. No. 46 at 15–21.) However, the Supreme Court has clarified that "[n]othing in our cases indicates that the NLRA guarantees class and collective action procedures, let alone for claims arising under different statutes and despite the express (and entirely unmentioned) teaching of the Arbitration Act." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1628 (2018). In their supplemental briefing, Plaintiffs make no mention of their NLRA argument, and the Court concludes that they are no longer pursuing it.

Second, Plaintiffs argued that the Arbitration Provision is unenforceable because, under the Fair Labor Standards Act, employees' rights to bring a collective action are not waivable. (*See* Dkt. No. 62 at 22.) However, the Ninth Circuit has rejected that argument. *See Horenstein v. Mortg. Mkt., Inc.*, 6 F. App'x 618, 619 (9th Cir. 2001).

[3] Prior to the Supreme Court's decision in *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019), the parties disputed whether Plaintiffs were subject to a "contract of employment." (*See* Dkt. Nos. 62 at 24–25, 68 at 14–17.) The parties now appear to agree that *New Prime* clarifies that Plaintiffs are subject to a contract of employment. (*See* Dkt. Nos. 103, 104.)

DoorDash, Inc., 343 F. Supp. 3d 891, 899 (N.D. Cal. 2018); *Bonner v. Mich. Logistics Incorp.*, 250 F. Supp. 3d 388, 397 (D. Ariz. 2017); *Levin v. Caviar, Inc.*, 146 F. Supp. 3d 1146, 1152–54 (N.D. Cal. 2015); *Lee v. Postmates Inc.*, 2018 WL 6605659, slip op. at 7 (N.D. Cal. 2018). Courts in this circuit have recognized that, in order for a delivery driver to qualify for the transportation worker exemption, the delivered good must have originated, or transformed into its final condition, in a different state than the delivery state. *See Magana*, 343 F. Supp. 3d at 899; *Levin*, 146 F. Supp. 3d at 1152–54; *Vargas v. Delivery Outsourcing, LLC*, 2016 WL 946112, slip op. at 3–5 (N.D. Cal. 2016). In this case, Plaintiffs deliver packaged goods that are shipped from around the country and delivered to the consumer untransformed. The Court concludes that Plaintiffs' work is readily distinguishable from the workers discussed in the above-cited case law.

For example, in *Lee v. Postmates*, the court found that the plaintiffs had not established that they fell within the transportation worker exemption because they "do not cite any case holding that making only local deliveries, *for a company that does not hold itself out as transporting goods between states*, constitutes engaging in interstate commerce within the meaning of the statute." *Lee*, 2018 WL 6605659, slip op. at 7 (emphasis added). But here, Defendants are akin to UPS and FedEx—they are widely known as a company able to transport goods across the country to consumers in a couple of days. To be sure, Defendants admit that they historically contracted with UPS and FedEx for the services that Plaintiffs now provide. (Dkt. No. 37 at 2.)

And in *Levin v. Caviar*, the court found that local food delivery did not constitute interstate commerce, despite the fact that the ingredients had travelled interstate, because the ingredients "ended their interstate journey when they arrived at the restaurant where they were used to prepare meals." *Levin*, 146 F. Supp. 3d at 1154. Again, this case is different: Defendants are in the business of delivering packages and goods across the country that are not transformed or modified during the shipping process. Plaintiffs deliver goods in the same condition as they

were shipped, and the goods are shipped around the country.

In *Vargas v. Delivery Outsourcing*, the court found that the plaintiff did not fall within the transportation worker exemption, despite the fact that he was in the business of delivering delayed airline luggage to its owners. *Vargas*, 2016 WL 946112, slip op. at 1, 3–5. But in *Vargas*, the luggage was not a "good" to be delivered until it was delayed or lost by the airline and then discovered when it was already intrastate. *See id.* Much like a food delivery service, a luggage delivery service is not engaged in interstate commerce because it is not in the business of shipping goods across state lines, even though it delivers goods that once travelled interstate. As mentioned above, Defendants are in the business of shipping goods across state lines.

Several out-of-circuit cases are more relevant to the facts at issue here because they have dealt with goods that often travel interstate without transformation. For example, in *Palcko v. Airborne Express*, the Third Circuit found that the plaintiff supervisor, who did not deliver packages herself, fell within the transportation worker exemption because she supervised employees who delivered packages, even though those employees' delivery routes were entirely intrastate. *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 590, 593 (3d Cir. 2004); *see also Zamora v. Swift Transp. Corp.*, 2008 WL 2369769, slip op. at 9 (W.D. Tex. 2008). In *Palcko*, the package delivery at issue involved the interstate shipment of untransformed goods, unlike prepared food delivery.

And in *Christie v. Loomis Armored US*, the court found that the plaintiff fell within the transportation worker exemption, even though he travelled strictly intrastate, because he delivered currency, "a good that is undisputedly in the stream of interstate commerce." *Christie v. Loomis Armored US, Inc.*, 2011 WL 6152979, slip op. at 3 (D. Colo. 2011). The *Christie* court reasoned that a delivery person "need not actually transport goods across state lines to be part of a class of employees engaged in interstate commerce." *Id.*

Consider the following hypothetical: A national freight company delivers finished goods to individuals and businesses using a series of distribution centers located across the country.

The company employs both "long-haul" and "short-haul" drivers—the former transporting goods from distribution center to distribution center, the latter from distribution center to customer. A distribution center in Northern California receives a shipment of mattresses from New York, some of which are then transported by a long-haul driver to a distribution center in Southern California, others of which are delivered by a short-haul driver to a customer in Southern Oregon. The long-haul truck driver would not be any less subject to the transportation worker exemption than the short-haul truck driver, whose route happens to cross state lines. If an employer's business is centered around the interstate transport of goods and the employee's job is to transport those goods to their final destination—even if it is the last leg of the journey—that employee falls within the transportation worker exemption.[4]

Finally, when deciding whether a particular employee falls within the transportation worker exemption, courts often consider whether a strike by a group of the employees at issue would interrupt interstate commerce. *See, e.g.*, *Levin*, 146 F. Supp. 3d at 1155; *Vargas*, 2016 WL 946112, slip op. at 5. The Court finds that a strike by a large group of Plaintiffs and those similarly-situated would interrupt interstate commerce. As mentioned previously, Defendants are one of the country's largest businesses engaged in the interstate shipment of packages and goods. A strike by Plaintiffs would be akin to local UPS or FedEx drivers striking—a strike by UPS or FedEx drivers, who only personally travel intrastate, would cause a ripple effect in interstate commerce because goods travelling interstate would still not make it to their final destination.

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[4] Although they were decided before *Circuit City*, the postal worker cases Plaintiffs cite are also helpful here. *See, e.g.*, *Bacashihua v. U.S. Postal Serv.*, 859 F.2d 402, 405 (6th Cir. 1988) (finding that a postal worker who never personally crossed state lines still engaged in interstate commerce, within the meaning of Section 1, because postal workers generally are "responsible for dozens, if not hundreds, of items of mail moving in interstate commerce on a daily basis"). Defendants argue that the postal worker cases are distinguishable because postal workers are members of a national collective bargaining agreement, which effectively turns intrastate postal workers into workers that fall within the transportation worker exemption. (Dkt. No. 108 at 11–12.) This is a distinction without a difference—whether an employee signs a national collective bargaining agreement is irrelevant to whether they are engaged in the business of interstate transportation of goods.

Therefore, Plaintiffs fall within the FAA's transportation worker exemption.

B. Enforceability of the Contract

"Section 1 [of the FAA] does not, however, in any way address the enforceability of employment contracts exempt from the FAA. It simply excludes these contracts from FAA coverage entirely." *Valdes v. Swift Transp. Co., Inc.*, 292 F. Supp. 2d 524, 529 (S.D.N.Y. 2003); *see also Palcko*, 372 F.3d at 596. Because the FAA is inapplicable to the Arbitration Provision, the Court must determine whether the Arbitration Provision is nevertheless enforceable, such that there is a valid agreement to arbitrate.

The Governing Law Provision states: "These Terms are governed by the law of the state of Washington without regard to its conflict of laws principles. However, the preceding sentence does not apply to [the Arbitration Provision], which is governed by the Federal Arbitration Act and applicable federal law." (Dkt. No. 37-1 at 5.) Having found that the FAA is inapplicable to the Arbitration Provision, the parties dispute whether it remains a valid agreement to arbitrate because the FAA's inapplicability conflicts with the language of the Governing Law Provision. (*See* Dkt. Nos. 103 at 20, 104 at 17–21, 107 at 13–14, 108 at 13–16.) "When a contract with an arbitration provision falls beyond the reach of the FAA, courts look to state law to decide whether arbitration should be compelled nonetheless." *Breazeale v. Victim Servs., Inc.*, 198 F. Supp. 3d 1070, 1079 (N.D. Cal. 2016). But again, the problem here is that the parties have explicitly contracted for Washington law to *not* apply to the Arbitration Provision. (Dkt. No. 37-1 at 5.)

Normally, "[t]o evaluate the validity of an arbitration agreement, federal courts 'should apply ordinary state-law principles that govern the formation of contracts.'" *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir. 2003) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).[5] Although federal and state policy favor arbitration, "courts must

[5] In this case, the parties have selected Washington law to govern the resolution of disputes arising out of the interpretation of the contract. (*See* Dkt. Nos. 37-1 at 5, 37-2 at 7.)

place arbitration agreements on an equal footing with other contracts[] and enforce them according to their terms." *AT&T Mobility LLC v. Concepcion*, 565 U.S. 333, 339 (2011) (citations omitted); *see also Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1197, 1199 (Wash. 2013).

"The touchstone of contract interpretation is the parties' intent." *Pelly v. Panasyuk*, 413 P.3d 619, 629 (Wash. Ct. App. 2018) (quoting *Tanner Elec. Coop. v. Puget Sound Power & Light Co.*, 911 P.2d 1301, 1310 (Wash. 1996)). In interpreting a contract, the court must try to ascertain the mutual intent of the parties at the time that they executed the contract. *Viking Bank v. Firgrove Commons 3, LLC*, 334 P.3d 116, 120 (Wash. Ct. App. 2014). To determine mutual intent, Washington courts follow the objective manifestation theory of contracts, meaning that courts look to the reasonable meaning of the contract language instead of the subjective intent of the parties. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 115 P.3d 262, 267 (Wash. 2005). "If a contract provision's meaning is uncertain or is subject to two or more reasonable interpretations," the provision is ambiguous. *Viking Bank*, 334 P.3d at 120. Ambiguity is to be construed against the drafter. *See, e.g., Pierce Cty. v. State*, 185 P.3d 594, 610 (Wash. Ct. App. 2008).

Defendants argue that Washington law is clearly applicable in the event that the FAA does not apply. The Court disagrees. The cases Defendants cite are inapposite; none of the cases discuss a situation where the FAA is inapplicable *and the contract clearly indicates that state law is also inapplicable*. (*See* Dkt. No. 108 at 13–17) (citing *Valdes*, 292 F. Supp. 2d at 527–30; *Maldonado v. Sys. Servs. of Am., Inc.*, 2009 WL 10675793, slip op. at 1–2 (C.D. Cal. 2009*); O'Dean v. Tropicana Cruises Int'l, Inc.*, 1999 WL 335381, slip op. at 1 (S.D.N.Y. 1999)). Here, if the parties intended Washington law to apply if the FAA was found to be inapplicable, they would have said so or even remained silent on the issue. Instead, they did the opposite—in the Governing Law Provision, the parties explicitly indicated that Washington law is not applicable to the Arbitration Provision. Indeed, it appears that it is precisely *against* the parties' intent to

apply Washington law to the Arbitration Provision. *Cf. Sagner v. Sagner*, 247 P.3d 444, 447 (Wash. Ct. App. 2011) (finding that parties are required to clearly indicate that general law is inapplicable, if that is what they intend to do). When the parties signed the contract at issue, Plaintiffs likely had no reason to believe that Washington law would ever apply to the Arbitration Provision.

Therefore, the Court finds that Washington law cannot be used to enforce the Arbitration Provision.[6] Because it is not clear what law to apply to the Arbitration Provision or whether the parties intended the Arbitration Provision to remain enforceable in the event that the FAA was found to be inapplicable, the Court finds that there is not a valid agreement to arbitrate.[7]

III. CONCLUSION

For the foregoing reasons, Defendants' motion to compel arbitration (Dkt. No. 36) is DENIED.

DATED this 23rd day of April 2019.

John C. Coughenour
UNITED STATES DISTRICT JUDGE

[6] Because the Court finds that Washington law is inapplicable to the Arbitration Provision, it expresses no opinion as to whether the Arbitration Provision would be enforceable under Washington law.

[7] Because the Court finds that there is not a valid agreement to arbitrate, it does not address whether the agreement encompasses the dispute at issue. *See Cox*, 533 F.3d at 1119.

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Christerphor Ziglar, et al.,

Plaintiffs,

v.

Express Messenger Systems Incorporated,

Defendant.

No. CV-16-02726-PHX-SRB

ORDER

At issue is Defendant's Motion to Dismiss or, Alternatively, Stay Proceedings, and Compel Arbitration ("MTD") (Doc. 35). The Court also considers Plaintiffs' Motion for Conditional Collective Action Certification and Court-Supervised Notice Pursuant to 29 U.S.C. § 216(b) ("MTC") (Doc. 33).

I. BACKGROUND

Plaintiffs brought this case as a class and collective action on behalf of delivery drivers in Arizona and neighboring states. Specifically, Plaintiffs allege that Defendant misclassified its drivers as independent contractors. (Doc. 29, Am. Collective and Class Action Compl. ("CAC") ¶ 1.) Plaintiffs allege Defendant violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, by failing to pay its drivers minimum wage and overtime. (*Id.* ¶ 2.) Plaintiffs also allege that Defendant has taken unlawful deductions and failed to pay minimum wage to delivery drivers in Arizona in violation of Arizona Revised Statutes ("A.R.S.") § 23-531 *et seq.* (*Id.* ¶ 3.) Defendant is a corporation that provides package delivery services to businesses and individuals. (*Id.* ¶ 10; Doc. 36,

Def.'s Answer to CAC ("Answer") ¶ 10.) Defendant contracts with Regional Service Providers ("RSPs") to provide these delivery services. (CAC ¶ 14; Answer ¶ 14.) Plaintiffs allege that the RSPs then subcontract with delivery drivers to make the actual deliveries. (CAC ¶ 15.) Plaintiffs further allege that although the written contracts between the drivers and the RSPs state that the drivers are independent contractors, the economic reality is that Defendant supervises and controls the delivery process to an extent that the drivers are really Defendant's employees. (*Id.* ¶¶ 15-17.)

Subcontracting Concepts CT LCC ("SCI") is a third party administrator that contracts with "Carrier and Logistics Clients", like Defendant, as well as "Owner Operator Clients", like the RSPs and Plaintiffs themselves, in order to connect both types of clients as well as handle administrative details in their relationships. (Doc. 35-1, Decl. of Dominick Simone[1] in Supp. of MTD ("Simone Decl.") ¶¶ 2-3.) Defendant and the RSPs with which Plaintiffs contracted entered into agreements with SCI that were operative during the relevant period. (MTD at 10.) Plaintiffs also individually entered into identical Owner Operator Agreements with SCI that contained arbitration provisions and signed Independent Contractor Acknowledgement Forms that included opt-out provisions for the arbitration provision. (Simone Decl. ¶¶ 10-11, 13, 15; *see also* Doc. 35-1, Ex. A – Owner/Operator Agreement signed by Plaintiff Christerphor Ziglar ("Owner/Operator Agreement"); Doc. 35-1, Ex. B – Independent Contractor Acknowledgement Form signed by Plaintiff Ziglar ("Acknowledgement Form").)[2] The Arbitration Provision in the Owner/Operator Agreement provides, in part:

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[1] Dominick Simone is the Vice President of Customer Service for SCI. (Simone Decl. ¶ 1.)

[2] Plaintiffs Leah Candelaria and Maurice Meintzer signed identical Owner Operator Agreements and Independent Contractor Acknowledgement Forms. (*See* Doc. 35-1, Ex. C – Owner/Operator Agreement signed by Plaintiff Candelaria; Doc. 35-1, Ex. D – Independent Contractor Acknowledgement Form signed by Plaintiff Candelaria; Doc. 35-1, Ex. E – Owner/Operator Agreement signed by Plaintiff Meintzer; Doc. 35-1, Ex. F – Independent Contractor Acknowledgement Form signed by Plaintiff Meintzer.) Because the Owner/Operator Agreements and Independent Contractor Acknowledgement Forms are identical, the Court will refer only to Exhibits A and B when referencing them. The Court will refer to the arbitration provisions at issue in these documents as the Arbitration Provision.

> In the event of any dispute, claim, question, or disagreement arising from or relating to this agreement or the breach thereof, or service arrangement between Owner/Operator and SCI's clients, the parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement. . . .
>
> All other disputes, claims, questions, or differences beyond the jurisdictional maximum for small claims courts within the locality of the Owner/Operator's residence shall be finally settled by arbitration in accordance with the Federal Arbitration Act.
>
> Neither you nor SCI shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity.
>
> The arbitration panel shall be made up of three (3) people. . . .
>
> The arbitrators will have authority to award actual monetary damages only. No punitive or equitable relief is authorized. All parties shall bear their own costs for arbitration and no attorney's fees or other costs shall be granted to either party.

(Owner/Operator Agreement at 10-11.) Defendant moves to dismiss this case and compel individual arbitration in accordance with the Arbitration Provision. (MTD at 6.) Plaintiffs move to conditionally certify collective action and Court-supervised notice to putative class members. (MTC at 2.) The Court will first consider Defendant's Motion.

II. LEGAL STANDARDS AND ANALYSES

A. Motion to Dismiss/Compel Arbitration

The Federal Arbitration Act ("FAA") "provides that arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1092 (9th Cir. 2009) (quoting 9 U.S.C. § 2). The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). "The court's role under the [FAA] is therefore limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). "If the court finds that an arbitration clause is valid and enforceable, the court should stay

or dismiss the action to allow the arbitration to proceed." *Kam–Ko Bio–Pharm Trading Co. Ltd–Australasia v. Mayne Pharma*, 560 F.3d 935, 940 (9th Cir. 2009). In determining whether a valid agreement to arbitrate exists, the Court applies the same standard used when resolving summary judgment motions pursuant to Rule 56 of the Federal Rules of Civil Procedure. *Coup v. Scottsdale Plaza Resort, LLC*, 823 F. Supp. 2d 931, 939 (D. Ariz. 2011); *see also Perry v. NorthCentral University, Inc.*, No. CV-10-8229-PCT-PGR, 2011 WL 4356499, *3 (D. Ariz. Sep. 19, 2011) (citing multiple cases that a motion to compel arbitration is resolved under the summary judgment standard). Therefore, the Court views all evidence in favor of the non-moving party to determine whether a valid arbitration agreement exists. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (explaining the summary judgment standard); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (same).

Plaintiffs argue that the Court should deny Defendant's Motion for five reasons: 1) the FAA does not apply because Plaintiffs qualify for the transportation workers exemption; 2) Defendant is not a third-party beneficiary to the Arbitration Provision and therefore may not enforce it; 3) the dispute falls outside the scope of the Arbitration Provision; 4) the Arbitration Provision is substantively unconscionable because of the provisions requiring cost splitting, prohibiting statutory damages, and prohibiting awards of attorneys' fees; and 5) the class action waiver is unconscionable in violation of the FLSA and the National Labor Relations Act. (Doc. 43, Pls.' Opp'n to MTD ("Resp. MTD") at 2-3.) The Court need only consider the fourth reason given by Plaintiffs. Plaintiffs argue that the Arbitration Provision is unconscionable because it prohibits statutory damages, it prohibits the award of attorneys' fees, and it requires the parties to split the costs of arbitration. (Resp. MTD at 17.) The Court agrees. Under Arizona law[3] "[a]n unconscionable contract is unenforceable." *Clark v. Renaissance W., LLC*, 307 P.3d 77, 79 (Ariz. Ct. App. 2013). "A contract may be substantively unconscionable when the

[3] Defendant does not dispute that the validity of the Arbitration Provision is governed by Arizona law. (*See generally* Doc. 47, Reply in Supp. of MTD ("Reply MTD").)

terms of the contract are so one-sided as to be overly oppressive or unduly harsh to one of the parties." *Id.* "[A] claim of unconscionability can be established with a showing of substantive unconscionability alone, especially in cases involving either price-cost disparity or limitation of remedies." *Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 59 (Ariz. 1995) (in banc).

Plaintiffs argue that the Arbitration Provision is unconscionable because it bars their "access to statutory remedies and penalties afforded to them under federal and Arizona law." (Resp. MTD at 17.) Specifically, they argue that the Provision's bar against punitive and equitable relief prevents them from recovering liquidated damages and treble damages available under the FLSA and Arizona wage laws. (*Id.*); *see also* 29 U.S.C. §216(b) (providing for liquidated damages to a prevailing FLSA plaintiff); A.R.S. § 23-355 (providing for treble damages for unpaid wages). Defendant argues that the Arbitration Provision does not prevent recovery of these damages because they are not punitive. (Reply MTD at 21.) Defendant is correct that liquidated damages under section 216(b) of the FLSA are characterized as compensatory in nature and are therefore not barred by the Arbitration Provision. *Local 246 Utility Workers Union of Am. v. S. Ca. Edison Co.*, 83 F.3d 292, 297 (9th Cir. 1996) ("These liquidated damages represent compensation, and not a penalty."). Arizona courts, however, have characterized the treble damages provision of A.R.S. § 23-355 as punitive in nature because it is designed to punish employers who withhold wages without reasonable justification or who attempt to defraud employees of wages earned. *Crum v. Maricopa Cty.*, 950 P.2d 171, 175 (Ariz. Ct. App. 1997) (listing cases in which Arizona courts have characterized wage dispute treble damages as punitive). Therefore, the Arbitration Provision would prevent recovery of these damages. Arbitration agreements are unenforceable if they fail "to provide for all of the types of relief that would otherwise be available in court." *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 895 (9th Cir. 2002). Therefore, the Arbitration Provision at issue here is unconscionable because it fails to provide for treble damages that are otherwise available under A.R.S. § 23-355.

Plaintiffs also argue that the Arbitration Provision's prohibition against attorneys' fees and costs awards is unconscionable because it prevents Plaintiffs from recovering an award otherwise available under the FLSA. (Resp. MTD at 18.) Defendant failed to dispute this argument in its Reply. (*See* Reply MTD at 21-23.) Regardless, the Court agrees with Plaintiffs. Fees are awarded in FLSA cases primarily to ensure that what are often small awards of withheld pay are not diminished by fees owed to plaintiffs' attorneys. *See Zhou v. Wang's Restaurant*, No. C 05-0279 PVT, 2007 WL 2298046, *2 (N.D. Cal. Aug. 8, 2007). The potential for a fee award allows plaintiffs to obtain counsel and vindicate their rights when they would otherwise be unable to do so. Therefore, the Court concludes that the prohibition on attorneys' fees in the Arbitration Provision interferes with Plaintiffs' ability to vindicate their rights under the FLSA and is therefore unconscionable.

Finally, Plaintiffs argue that the Arbitration Provision is unconscionable because the cost-splitting provision denies them the opportunity to vindicate their rights. (Resp. MTD at 18.) Under Arizona law, "[a]n arbitration agreement may be substantively unconscionable if the fees and costs to arbitrate are so excessive as to 'deny a potential litigant the opportunity to vindicate his or her rights.'" *Clark*, 307 P.3d at 79 (quoting *Harrington v. Pulte Home Corp.*, 119 P.3d 1044, 1055 (Ariz. Ct. App. 2005)). "The party seeking to invalidate an arbitration agreement on such grounds has the burden of proving that arbitration would be prohibitively expensive." *Id.* at 80. In determining whether arbitration would be prohibitively expensive, courts consider the cost to arbitrate, evidence showing whether the party can pay the costs to arbitrate, and whether the arbitration agreement or rules of arbitration permit a party to waive or reduce the costs of arbitration based on financial hardship. *Id.* Plaintiffs have produced evidence showing that arbitration of their wage claims before a three-arbitrator panel would likely cost at least $56,000. (Doc. 43-5, Decl. of Tod F. Schleier in Opp'n to MTD ¶¶ 4-10.) Therefore, pursuant to the Arbitration Provision which requires that "all parties shall bear their own costs for arbitration," Plaintiffs would have to pay $28,000 each to arbitrate their claims

individually as required by the class action waiver. Plaintiffs have also produced evidence showing that they lack the financial resources to pay their arbitration costs. (Doc. 43-2, Decl. of Christerphor Ziglar in Opp'n to MTD ¶¶ 8-10; Doc. 43-3, Decl. of Leah Candelaria in Opp'n to MTD ¶¶ 11-18; Doc. 43-4, Decl. of Maurice Meintzer in Opp'n to MTD ¶¶ 11-18.) Finally, the Arbitration Provision itself does not provide for a reduction in costs for financial hardship and contains no reference to the rules that will govern the arbitration. Therefore, the Court concludes that Plaintiffs have met their burden to show that arbitrating their claims would be prohibitively expensive and would prevent them from vindicating their rights. As such, the cost-splitting provision is also unconscionable.

Plaintiffs argue that the Court should hold the entire Arbitration Provision unconscionable and unenforceable because of the unconscionable portions. (Resp. MTD at 19.) Defendant argues the Court should sever the offensive portions of the Arbitration Provision and enforce the remainder. (Reply MTD at 22-23.) In Arizona, "[t]he equitable principles underlying codification of unconscionability are part and parcel of the statute." *Maxwell*, 907 P.2d at 60.

> [C]ourts will not lend their hand to the enforcement of oppressive contracts, and the statute mandates that Arizona courts must either (1) refuse to enforce an unconscionable contract, (2) refuse to enforce any unconscionable portion of a contract, or (3) limit the application of any unconscionable clause of a contract to avoid any unconscionable result.

Id. (citing A.R.S. § 47-2303(A)). The Arbitration Provision at issue here is so permeated by unconscionability that the Court refuses to enforce it. *See Zaborowski v. MHN Gov't Servs., Inc.*, 601 F. App'x 461, 464 (9th Cir. 2014) (district court did not abuse its discretion by refusing to enforce arbitration agreement with five unconscionable provisions); *Newton v. Am. Debt Servs., Inc.*, 601 F. App'x 461, 464 (9th Cir. 2013) (district court did not abuse its discretion by refusing to enforce arbitration agreement with four unconscionable provisions). The extent of unconscionability here would force the Court to rewrite, rather than interpret, the parties' Arbitration Provision. *See Capili v. Finish Line, Inc.*, No. 15-16657, 2017 WL 2839504, at *2 (9th Cir. July 3, 2017)

("Although the [FAA] articulates a preference for the enforcement of arbitration agreements, employers may not stack the deck unconscionably in their favor to discourage claims, then force courts 'to assume the role of contract author rather than interpreter.'" (quoting *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003))). Therefore, the Court denies Defendant's Motion to dismiss the case and compel arbitration.

B. Motion for Conditional Collective Action Certification

Section 216(b) of the FLSA provides that one or more employees may bring a collective action "on behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). To determine whether plaintiffs are "similarly situated," courts in this circuit have applied a two-step approach for making a collective action determination. *See Kesley v. Entertainment U.S.A. Inc.*, 67 F. Supp. 3d. 1061, 1065 (D. Ariz. 2014). At the "notice stage," the court makes an initial determination of whether to conditionally certify the class in order to notify potential class members. *Colson v. Avnet, Inc.*, 687 F. Supp. 2d 914, 925 (D. Ariz. 2010). The plaintiff carries the burden of showing that members of the proposed class are similarly situated. (*Id.*) The standard at this initial stage is a "lenient one that typically results in certification." *Hill v. R+L Carriers, Inc.*, 690 F. Supp. 2d 1001, 1009 (N.D. Cal. 2010). The court "'require[s] nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan.'" *Colson*, 687 F. Supp. 2d at 925 (quoting *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001)). Courts use their discretion when examining the particular allegations and relevant circumstances of a case to determine whether a plaintiff sufficiently demonstrated potential members are similar. *Kelsey*, 67 F. Supp. 2d at 1068. At the second stage, in response to a motion to decertify the class and typically after the close of discovery, the court re-evaluates certification and applies a more rigorous analysis. *Colson*, 687 F. Supp. 2d at 925.

Plaintiffs move this Court to conditionally certify a class consisting of:

> All current or former delivery drivers who have delivered packages for OnTrac within the State of Arizona and who were or are classified or paid as independent contractors and/or not classified or paid as employees at any time on or after August 11, 2013.

(MTC at 3.) Plaintiffs allege that the members of the proposed class are similarly situated because they were all employed by Defendant through the same "fissured employment" scheme in which Defendant attempted to distance itself from the proposed class by requiring them to contract through RSPs but, in reality, maintained almost total control over their work. (*Id.*) Plaintiffs allege that, under this scheme, the drivers all had substantially similar duties, were all classified as independent contractors, were all subject to substantially the same payment structure in which they were paid per delivery (with or without base pay), and were not guaranteed minimum wage or paid for their overtime work. (*Id.* at 3-4.) Defendant argues that Plaintiffs have failed to show that the putative class members are similarly situated and subject to a single policy or plan because all delivery drivers contracted through various RSPs that had power to classify the drivers as independent contractors or employees and set the terms of the relationship. (Doc. 44, Def.'s Memorandum of Points and Authorities in Opp'n to MTC ("Resp. MTC") at 13-14, 15-18.) Defendant also argues that the Court cannot certify a collective action based only on an allegation that all putative members were similarly misclassified.[4] (*Id.* at 14-15.) Finally, Defendant argues that Plaintiffs have not shown that each member of the putative collective worked more than 40 hours in a workweek or earned less than minimum wage. (*Id.* at 18-19.)

The Court concludes that Plaintiffs' evidence is sufficient as a threshold matter to show that Defendant has established a common policy or plan of fissured employment whereby drivers are required to contract with RSPs as independent contractors even

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[4] The Court rejects this argument because, as explained more fully below, Plaintiffs' allegations claim that putative class members performed the same core job duties, that they are subject to similar rules and controls on their work, that they often work more than 40 hours in a week, and that they do not receive overtime or a guaranteed minimum wage. Therefore, their allegations of being similarly situated are not limited to allegations of being misclassified alone.

though Defendant maintains control over their work. The Court also finds that the putative class members are similarly situated with respect to this policy or plan. Along with the factual allegations contained in the CAC, Plaintiffs have submitted declarations claiming that they and other delivery drivers were substantially controlled by Defendant in their work and that they were regularly required to work more than 40 hours per week without overtime pay. (*See* Doc. 33-3, Ex. C – Decl. of Maurice Meintzer in Supp. of MTC ("Meinzter Decl."); Doc. 34, Ex. D – Decl. of Christerphor Ziglar in Supp. of MTC ("Ziglar Decl."); Doc. 33-4, Ex. E – Decl. of Leah Candelaria in Supp. of MTC ("Candelaria Decl.").) Plaintiffs' declarations also state that they all contracted with multiple RSPs and that the rules and regulations that governed their work duties remained the same. (Meintzer Decl. ¶ 4; Ziglar Decl. ¶ 3; Candelaria Decl. ¶ 4.) Although Defendant argues that Plaintiffs rely on evidence that lacks specificity and may not be admissible at trial, the Court concludes that it is sufficient under the relaxed evidentiary standards that are applied at the initial stage of collective action certification. *See Shia v. Harvest Mgmt. Sub LLC*, 306 F.R.D. 268, 275 (N.D. Cal. 2015) (noting that although some courts have concluded that only admissible evidence may be considered at this stage, "a majority of courts [in the Ninth Circuit] have determined that evidentiary rules should be relaxed at this stage"); *see also Syed v. MI,* LCC, No. 1:12-CV-1718-AWI-MJS, 2014 WL 6685966, at *6 (E.D. Cal. Nov. 26, 2014) (concluding that evidentiary rules are not strictly applied at the conditional certification stage). The Court also concludes that whether the proposed class members are not similarly situated in the performance of their primary responsibilities and how much control Defendant had over their daily work versus the RSPs with which they contracted are issues more appropriately decided on a more developed factual record. *See Colson*, 687 F. Supp. 2d at 926 ("It is not the Court's role to resolve factual disputes . . . or . . . decide substantive issues going to the ultimate merits . . . at the preliminary certification stage of an FLSA collective action." (quotation marks omitted)). The Court rejects Defendant's argument that Plaintiffs must show that all putative class members worked more than 40 hours per

week and made less than minimum wage for the same reason. The Court concludes that Plaintiffs have provided "substantial allegations" that they and the putative class members are similarly situated because they were subject to the same "fissured employment" scheme, performed the same core job duties, and were subject to Defendant's control in their performance of these duties. Therefore, the Court grants Plaintiffs' Motion to conditionally certify collective action.

C. Notice

Plaintiffs have attached their proposed Notice and Opt-in Forms to their Motion. (*See* Doc. 33-1, Ex. A – Notice Form; Doc. 33-2, Ex. B – Opt-in Form.) Plaintiffs request the Court enter an order certifying their proposed class; requiring Defendant to identify all current and former delivery drivers who worked during the class period and produce their names, addresses, email addresses, telephone numbers, dates they made deliveries[5], birthdates, and the last four digits of their Social Security Numbers; authorizing Plaintiffs to mail, email, and text message the Notice to the person identified; granting 90 days for identified drivers to opt-in; and directing Defendant to post the Notice and Opt-in Forms in conspicuous places at its Phoenix warehouse. (MTC at 17-18.) Defendant argues that Plaintiffs' production request is overly broad and unduly burdensome and requests the Court limit it. (Resp. MTC at 19.) Defendant, however, fails to specify which parts of the request should be limited, and Plaintiffs have cited authority from several courts ordering the production of addresses, email addresses, and telephone numbers. (MTC at 16.) Therefore, the Court will order the production requested by Plaintiffs with the exception of the birthdates, last four digits of the Social Security Numbers, and delivery dates of the delivery drivers because the Court can see no reason why Plaintiffs need this information to provide the drivers with notice of this action.

Defendant also raises several objections to Plaintiffs' proposed Notice Form. (Resp. MTC at 20.) First, Defendant objects to language in the Notice that states that

[5] Although this information may be relevant and appropriately discoverable at a later stage in this action, it is not necessary for the purpose of providing notice to putative collective members.

putative class members "worked as [] delivery driver[s] for OnTrac in Arizona during the last three years and were classified as [] independent contractor[s]" arguing that it misrepresents the relationship between the delivery drivers, the RSPs, and Defendant. (*Id.*) Defendant suggests replacing this language with the following: ". . . you have performed SP services for a[] Regional Service Provider who has contracted work with OnTrac at some point during the last three years." (*Id.*) Plaintiffs argue this proposed language is likely to confuse potential opt-ins, and the Court agrees. (Doc. 46, Pls.' Reply in Supp. of MTC ("Reply MTC") at 9.) The language proposed by Plaintiffs makes sufficiently clear that putative class members were not formally considered Defendant's employees simply because they performed work for Defendant. Therefore, the Court will not require Plaintiffs to amend this language.[6]

Defendant also argues that Plaintiffs should be required to add a disclaimer after the third full paragraph in the Notice setting forth Defendant's position on Plaintiffs' allegations. (Resp. MTC at 20.) Plaintiffs agree to include a sentence in the Notice stating that "Defendant denies these allegations." (Reply MTC at 10.) The Court concludes that this is sufficient to make Defendant's position clear. Defendant also argues that the Notice is deficient because it does not specify that the Court or a jury must determine whether the class members' rights have been violated. (Resp. MTC at 20.) The Notice, however, states that "there has not been a decision by the court as to whether the Plaintiffs' position or Defendant's position is the correct one." (Notice Form at 2.) Therefore, the Court concludes that the proposed Notice is sufficiently clear that the claims will be determined in court.

Defendant argues that the Notice does not sufficiently specify that opt-ins may be required to be deposed or testify at trial. (Resp. MTC at 20.) The relevant language in the Notice states: "You may also be asked to be a witness or to provide evidence in the case,

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[6] Defendant also requests, without providing any justification, that the Notice provide a 60-day deadline to opt into the class instead of a 90-day deadline as requested by Plaintiffs. Because Defendant has failed to offer any justification, the Court declines to change the deadline.

although not all individuals who submit a consent form will be required to do so." (Notice Form at 2.) The Court agrees that this language does not sufficiently notify prospective class members of their potential obligations and will require the language to be amended as follows: "You may also be **required** to be a witness **at a deposition or at trial** or to provide evidence in the case, although not all individuals who submit a consent form will be required to do so." (alterations in bold).

Finally, Defendant argues that the Notice should inform putative class members that they may be subject to counterclaims and be liable for attorneys' fees and costs if they do not prevail. (Resp. MTC at 20.) Plaintiffs argue that including such a warning would be misleading because prevailing defendants are generally not entitled to attorneys' fees under the FLSA. (Reply MTC at 10.) The Court agrees that such a warning would be misleading and appears to be designed to chill participation in the class and will therefore not require it.

III. CONCLUSION

The Court denies Defendant's motion to compel arbitration because the Arbitration Provision at issue is substantively unconscionable and therefore unenforceable. The Court grants Plaintiffs' motion to conditionally certify a collective class because they have met their initial burden of providing substantial allegations showing that the putative class was subject to the same plan or policy. The Court grants Plaintiffs' request for production and to issue Notice to putative class members in accordance with this Order.

IT IS ORDERED denying Defendant's Motion to Dismiss or, Alternatively, Stay Proceedings, and Compel Arbitration (Doc. 35).

IT IS FURTHER ORDERED granting Plaintiffs' Motion for Conditional Collective Action Certification and Court-Supervised Notice Pursuant to 29 U.S.C. § 216(b) (Doc. 33).

IT IS FURTHER ORDERED conditionally certifying this action as a collective action pursuant to 29 U.S.C. § 216(b) for the following: All current or former delivery

drivers who have delivered packages for OnTrac within the State of Arizona and who were or are classified or paid as independent contractors and/or not classified or paid as employees at any time on or after August 11, 2013.

IT IS FURTHER ORDERED directing Defendant to identify all current and former delivery drivers who delivered packages for OnTrac within the State of Arizona and who were or are classified or paid as independent contractors and/or not classified or paid as employees at any time on or after August 11, 2013 and to produce to Plaintiffs the names, last known addresses, all known email addresses, and all known telephone numbers of these drivers within five business days of the date of this Order.

IT IS FURTHER ORDERED directing Plaintiffs to provide Defendant with updated copies of the Notice and Opt-in Forms amended in accordance with this Order.

IT IS FURTHER ORDERED authorizing Plaintiffs to mail, email, and text message the Notice attached to their Motion as Exhibit A as amended pursuant to this Order to all drivers set forth above.

IT IS FURTHER ORDERED granting all drivers set forth above a period of 90 days following receipt of Notice to "opt in" to this action.

IT IS FURTHER ORDERED directing Defendant, beginning on the date Defendant produces the information ordered above, to post for a period of 90 days the Notice and Opt-in Forms provided by Plaintiffs in conspicuous places at OnTrac's Phoenix warehouse and any other such locations controlled by Defendant where delivery drivers within the conditionally certified collective gather and can see such notices.

Dated this 31st day of August, 2017.

Susan R. Bolton
United States District Judge

FILED

OCT 04 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHRISTERPHOR ZIGLAR; et al., Plaintiffs-Appellees, v. EXPRESS MESSENGER SYSTEMS, INC., dba OnTrac, a Delaware corporation, Defendant-Appellant.	No. 17-16920 D.C. No. 2:16-cv-02726-SRB MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Susan R. Bolton, District Judge, Presiding

Argued and Submitted August 15, 2018
San Francisco, California

Before: SCHROEDER, SILER,** and GRABER, Circuit Judges.

Express Messenger Systems, Inc. ("OnTrac") appeals the district court's order denying its motion to compel arbitration of wage-and-hour claims brought by delivery drivers. We have jurisdiction under 9 U.S.C. § 16, and we review the

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

denial of arbitration de novo. *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1259 (9th Cir. 2017). We vacate the district court's order and remand for further proceedings.

The district court denied OnTrac's motion to compel arbitration on the ground that the arbitration provision in the "Owner Operator Agreements" between the drivers and Subcontracting Concepts CT, LLC, was substantively unconscionable under Arizona law. After the district court entered its order, the Supreme Court issued its opinion in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), addressing the applicability of the Federal Arbitration Act's "saving clause," which permits arbitration agreements to be invalidated by "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

We therefore vacate the district court's order denying OnTrac's motion to compel arbitration and remand for further proceedings in light of *Epic Systems Corp.*, including, if appropriate, consideration of the parties' other arguments regarding arbitrability. We also note for the district court's further consideration that there is a pending case, currently on the court's Seattle calendar for November 2018, that may raise similar issues: *Ege v. Express Messenger Sys., Inc.*, No. 17-35123.

VACATED and REMANDED. The parties shall bear their own costs on appeal.

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
CIVIL MINUTES

Phoenix Division

CV 16-02726-PHX-SRB DATE: 10-29-18
Year Case No.

HON: SUSAN R. BOLTON

Christerphor Ziglar, et al. v. Express Messenger Systems Incorporated
Plaintiff(s) Defendant(s)

Deputy Clerk: Maureen Williams Court Reporter: Laurie Adams

Harold Lichten, Daniel Bonnett and Olena Savytska (all appearing telephonically)
Plaintiff(s) counsel

Damon Ott and Lauren Meyerholz (both appearing telephonically)
Defense counsel

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PROCEEDINGS: X Open Court _Chambers _ SEALED

This is the time set for Telephonic Status Conference. Discussion held regarding the 9th Circuit Court of Appeals' Mandate (Doc. 115).

In light of the Order of the 9th Circuit Court of Appeals remanding this case for consideration for further proceedings in light of *Epic Systems Corp.,* including, if appropriate, consideration of the parties' other arguments regarding arbitrability,

IT IS ORDERED that counsel file simultaneous supplemental briefing (not to exceed 10 pages) no later than **November 19, 2018**; no response or reply shall be filed.

EXHIBIT G

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Christerphor Ziglar, et al., Plaintiffs, v. Express Messenger Systems Incorporated, et al., Defendants.	No. CV-16-02726-PHX-SRB **ORDER**

This matter comes before the Court on remand from the Ninth Circuit ("Remand Mem.") (Doc. 115-1), which vacated the Court's Order denying Defendant's Motion to Dismiss or Alternatively, Stay Proceedings, and Compel Arbitration ("Mot.") (Doc. 35), and remanded for further proceedings consistent with the Supreme Court's holding in *Epic Systems Corp. v. Lewis*.[1] The Court now considers whether Defendant's Motion should be granted in light of *Epic Systems*.

I. BACKGROUND

The Court summarized the factual background of this case in a previous Order, which is fully incorporated herein. (*See* Doc. 64, Aug. 31, 2017 Order ("Order") at 1–3.) In that Order, the Court denied Defendant's Motion, and granted Plaintiffs' Motion for Conditional Collective Action Certification and Court-Supervised Notice. (*Id.* at 13.) The Court concluded that the Arbitration Provision at issue was substantively unconscionable and unenforceable because it: (1) prevented recovery of treble damages otherwise available

[1] 138 S. Ct. 1612 (2018).

under A.R.S. § 23-355; (2) prohibited Plaintiffs' from recovering attorneys' fees and costs awards, interfering with their rights under the Fair Labor Standards Act ("FLSA"); and (3) prevented Plaintiffs from vindicating their rights because arbitration would be prohibitively expensive. (*Id.* at 4–8.)

On September 22, 2017, Defendant filed a Notice of Appeal. (Doc. 66, Def.'s Notice of Appeal.) On October 4, 2018, the Ninth Circuit vacated the Court's Order denying Defendant's Motion, and remanded the case for further proceedings consistent with *Epic Systems*. (Remand Mem. at 2.) The Ninth Circuit additionally instructed the Court to consider *Ege v. Express Messenger Systems, Inc.*, and, where appropriate, the parties' other arguments regarding arbitrability.[2] (*Id.* (citing 745 F. App'x 19 (9th Cir. 2018).) On October 29, 2018, the Court asked the parties to file simultaneous memoranda on the issues addressed in the Ninth Circuit's Remand Order. (Doc. 116, Civil Mins.)

Initially, Plaintiffs argued that the class action waiver in the Arbitration Provision was unconscionable because it violated their rights under federal law. (Doc. 43, Resp. in Opp'n to Mot. at 3.) The Court did not consider Plaintiffs' class action waiver argument at that time and does not consider it now, as Plaintiffs concede that *Epic Systems* renders the argument moot.[3] (Order at 4; Doc. 117, Pls.' Br. at 3.) Plaintiffs now argue that *Epic Systems* does not impact the Court's previous finding of substantive unconscionability because it reaffirms that unconscionability is a "generally applicable contract defense"[4] to arbitration agreements.[5] (Pls.' Br. at 2.) Defendant counters that *Epic Systems* reiterates the

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[2] In *Ege*, appellants argued for the first time on appeal that the Arbitration Provision was substantively unconscionable. 745 F. App'x at 20. Because appellants failed to raise this argument in the district court, the Ninth Circuit did not consider whether the agreement was unconscionable. *Id. Ege*, therefore, is inapplicable.

[3] Plaintiffs are correct. This is exactly the type of defense *Epic Systems* dismisses, as it interferes with a "fundamental attribute[] of arbitration." 138 S. Ct. at 1622 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011)).

[4] While the Court has previously referred to Plaintiffs' substantive unconscionability defense as an "argument," in this Order, "argument" and "defense" are interchangeable.

[5] Plaintiffs alternatively argue that Defendant's Motion should be denied because: (1) the Federal Arbitration Act ("FAA") does not apply because Plaintiffs qualify for the transportation workers exemption; (2) the dispute is outside the scope of the arbitration agreement; and (3) Defendant is not a signatory to the arbitration agreement and cannot enforce it. (Pls.' Br. at 4–9.) The Court does not reach Plaintiffs' alternative arguments. (Doc. 118, Def.'s Suppl. Br. in Supp. of Mot. ("Def.'s Br.") at 10–14.)

FAA's "liberal federal policy favoring arbitration agreements," thereby voiding Plaintiffs' substantive unconscionability argument. (Def.'s Br. at 5, 7–8.)

II. LEGAL STANDARD AND ANALYSIS

In *Epic Systems*, the Supreme Court clarified the scope of the FAA's savings clause. *See* 138 S. Ct. at 1621. The FAA "establishes a 'liberal federal policy favoring arbitration agreements.'" *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Consistent with this policy, the FAA instructs courts to treat arbitration agreements as "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

In relevant part, the employees in *Epic Systems* challenged the agreement's individual arbitration requirement. 138 S. Ct. at 1622. Specifically, the employees argued that the National Labor Relations Act ("NLRA"), which permits collective or class proceedings, rendered the class and collective action waivers in the agreement illegal. *Id.* According to the employees, because illegality is a ground for revocation of any contract, the savings clause "saved" the provisions precluding class or collective action proceedings. *Id.* The Supreme Court rejected this argument, explaining that while the FAA's savings clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,'" the "clause does not save defenses that target arbitration . . . by 'interfer[ing] with fundamental attributes of arbitration.'" *Id.* at 1622 (quoting *Concepcion*, 563 U.S. at 339, 344).[6] The Supreme Court held that because the employees' illegality defense targeted the individualized nature of arbitration, it

[6] *Epic Systems* frequently references "interfering with the fundamental attributes of arbitration." *See, e.g.*, 138 S. Ct. at 1622. *Concepcion*, cited liberally in *Epic Systems*, describes those "fundamental attributes." In *Concepcion*, the Supreme Court considered "a state law defense that prohibited as unconscionable class action waivers in consumer contracts." *Epic Sys.*, 138 S. Ct. at 1622. *Concepcion* held that although the defense of unconscionability formally applied in the arbitration context, the defense was not protected under the savings clause because it "interfered with a fundamental attribute of arbitration." *Id.* Fundamental to arbitration, the Court explained, was its "traditionally individualized and informal nature." *Id.* at 1623. Because the waiver effectively enabled a "switch from bilateral to class arbitration," it ceded "the principal advantage of arbitration—its informality." *Concepcion*, 563 U.S. at 348.

interfered with one of arbitration's fundamental attributes.[7] *See Epic Sys.*, 138 S. Ct. at 1622.

Here, Plaintiffs' unconscionability defenses do not target arbitration or interfere with arbitration's fundamental attributes; they are generally applicable contract defenses that "exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Arbitration Provision still prevents recovery of treble damages that would otherwise be available under Arizona wage laws. (*See id.* at 5 (citing A.R.S. § 23-355; *Crum v. Maricopa Cty.*, 950 P.2d 171, 175 (Ariz. Ct. App. 1997).) The Arbitration Provision still prevents Plaintiffs from recovering attorneys' fees and costs, hindering their ability to secure counsel and vindicate their rights under the FLSA. (Order at 6.) Finally, the Arbitration Provision still contains no "reduction in costs for financial hardship and contains no reference to the rules that will govern arbitration."[8] (*Id.* at 7.) *Epic Systems*, therefore, does not impact the Court's prior conclusion, that "[t]he extent of unconscionability here would force the Court to rewrite, rather than interpret, the parties' Arbitration Provision." (Order at 7.)

III. CONCLUSION

The Court denies Defendant's Motion to Dismiss or, Alternatively, Stay Proceedings and Compel Arbitration because the Court's previous finding of substantive unconscionability remains unmoved by *Epic Systems*.

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. . .

[7] Because *Epic Systems* was decided less than a year ago, there are relatively few cases that deal directly with the validity of a plaintiff's illegality defense to an arbitration agreement. In those cases where courts have rejected plaintiffs' illegality defenses, the defenses have improperly targeted arbitration. *See, e.g.*, *Gaffers v. Kelly Servs., Inc.*, 900 F.3d 293, 296–97 (6th Cir. 2018) (holding that an employee's argument that an agreement requiring individual arbitration was illegal because the FLSA permits employees to pursue collective actions plainly interfered with arbitration's "historically individualized nature").

[8] The Court's Order discusses the excessiveness of the fees and costs associated with the Arbitration Provision (and examines the evidence produced by Plaintiffs showing that they lack the financial resources to pay arbitration costs). (Order at 6–7.)

IT IS ORDERED denying Defendant's Motion to Dismiss or, Alternatively, Stay Proceedings and Compel Arbitration (Doc. 35).

Dated this 4th day of March, 2019.

Susan R. Bolton
United States District Judge